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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LOUIE L. WAINWRIGHT, Secretary
Florida Department of Corrections,

Petitioner,

vs.

WILLIAM LEE THOMPSON,

Respondent.

On Petition for a Writ of Certiorari
~~to the District Court of Appeal of Florida, Third District~~
U.S. Court of Appeals for the Eleventh Circuit

BRIEF OF PETITIONER ON JURISDICTION

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QUESTIONS PRESENTED

1) WHETHER A FEDERAL COURT MUST ACCEPT THE STATE'S EXPLICIT WAIVER OF THE EXHAUSTION OF STATE REMEDIES REQUIREMENT?

2) WHETHER A FEDERAL COURT CAN PROPERLY ORDER A CONTINUANCE IN ORDER TO PERMIT THE DEFENDANT TO RAISE UNEXHAUSTED CLAIMS IN STATE COURT?

3) WHETHER THE DEFENDANT'S UNEXHAUSTED CLAIMS SHOULD BE REJECTED AS WAIVED BY DEFENSE COUNSEL'S DELIBERATE TACTICAL CHOICE?

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PREFACE

The Petitioner, Louie L. Wainwright, Secretary, Florida Department of Corrections was the Respondent in the United States District Court and the Appellant upon the interlocutory appeal under Rule 5 of the Federal Rules of Appellate Procedure to the United States Eleventh Circuit Court of Appeals. The Respondent, William Lee Thompson was the Petitioner in the United States District Court and the Appellee in the Eleventh Circuit. In this brief the parties will be referred to as the State and the Defendant respectively.

The following reference is made in this brief:

(A) For the portions of the record below sufficient to show jurisdiction in this Court, which are contained in the Petitioner's Appendix and consisting of pages A1-A89.

I.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Florida filed on June 7, 1982 is contained in the State's Appendix at A1-A9. This opinion is unreported.

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at Thompson v. Wainwright, 714 F.2d 1495 (11th Cir. 1983) and is contained in the State's Appendix at A10-A67.

The second opinion of the United States District Court pursuant to the mandate in Thompson v. Wainwright, supra, filed on February 10, 1984 is contained in the State's Appendix at A77-A89. This opinion is unreported.

II.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, §1257 (3) and §2254 (b and c) and Amendments VI and XIV of the United States Constitution.

III

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment VI of the Constitution of the United States provides that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Amendment XIV of the Constitutiln of the United States provides *inter alia*, that:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges

or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Title 28 U.S.C. §2254(b) and (c) provides that:

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

IV

STATEMENT OF THE CASE

After a plea of guilty, the Defendant, William Lee Thompson was convicted and sentenced to death for the brutal slaying of the victim, Sally Ivester. The Defendant's sentence and conviction were affirmed by the Florida Supreme Court on November 6, 1980. See, Thompson v. State, 389 So.2d 197 (Fla. 1980); see, also, Thompson v. State, 351 So.2d 701 (Fla. 1977).

The Defendant subsequently testified at the trial of his co-defendant Rocco James Surace, and took the entire blame for the killing upon himself. See, Surace v. State, 378 So.2d 895 (Fla. 3d DCA 1980); see, also, Surace v. State, 351 So.2d 702 (Fla. 1977).

On August 5, 1981 the Defendant filed a Motion for Collateral Relief under Rule 3.950, Fla.R.Crim.P., asking that his sentence be reduced because the co-defendant Surace was convicted of second degree murder after a jury trial. The Florida trial court summarily denied the Defendant's application on August 6, 1981. On February 11, 1982, the Florida Supreme Court affirmed the summary denial of the Defendant's Rule 3.850 Motion. See, Thompson v. State, 410 So.2d 500 (Fla. 1982).

The Defendant was subsequently scheduled to be put to death by execution on March 2, 1982, at 7:00 a.m. The Defendant filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Florida six days before his scheduled execution. See,

Thompson v. Wainwright, 714 F.2d 1495 (11th Cir. 1983). (A10-A67.) In his petition for writ of habeas corpus, the Defendant had raised certain claims, for which the Defendant had exhausted his State remedies. A13. However, the Defendant also sought a stay of execution and filed a motion for a continuance in order to return to state court to raise claims for which he had not exhausted his State remedies. A13-A14. The State opposed the Defendant's motion for a continuance upon the grounds that the Defendant had, by a tactical choice deliberately forfeited his right to litigate the present claims by ignoring the State forum. A2;A14-A15. Additionally, the undersigned as representative of the Attorney General and the State of Florida asserted an express waiver of any requirement of exhaustion of State remedies and urged the District Court below to proceed. A15.

The United States District Court for the Southern District of Florida held that the exhaustion requirement could not be waived; granted the Defendant's motion for a continuance and motion for a stay and ordered that the parties should return to State Court in order to permit the Defendant to exhaust his state court remedies. A16.

Upon review, on September 6, 1983, the Eleventh Circuit held; (1) that the Attorney General of Florida could properly and fully waive an exhaustion requirement on behalf of the State of Florida; (2) that the federal trial court could however in its discretion accept or reject such a waiver based upon the nature of the case and such factors as the condition of the federal and state trial court dockets and (3) that the

federal trial court could grant a continuance upon what was substantially a mixed petition, despite the mandate of Rose v. Lundy, 455 U.S. 509 (1982), in order to accomplish the foregoing. A18-A66. On October 12, 1983, the Court denied the State's petition for rehearing and petition for rehearing en banc. A68 On October 19, 1983, the Court also denied the State's motion for a stay pending review in this Honorable Court. A70.

On November 8, 1983, Justice Powell declined the State's request for a stay of the Eleventh Circuit mandate. See Wainwright v. Thompson, U.S.Sup.Ct. Case No. A335. On November 28, the Court declined the State's request to stay the Eleventh Circuit's mandate. Id.

Pursuant to the present decision of the Eleventh Circuit, on December 8, 1983 the District Court requested and received written statements from the parties concerning the following matters:

> "1. The nature and extent of the fact finding required for proper resolution of the petitioner's unexhausted claims;
>
> "2. The amount of delay already incurred in this case and reasonably foreseeable if the continuance is granted. This consideration involves inquiry into how long it has been since the petitioner's conviction and sentence were imposed, how long state exhaustion will require and the comparative status of the dockets of federal and state trial court's and;
>
> "3. The nature of the legal issues involved; specifically, whether there are fundamental state policies at stake in the case or threshhold issues of undecided state law."

See, A77-A89. On February 10, 1984, in an extensive written order the District Court accepted the State's waiver of

exhaustion of state remedies and denied the Defendant's Motion for a Continuance. Id. The Court thereupon set the matter for an evidentiary hearing and specifically rejected the State's argument that important state/federal issues were implicated by the instant petition in this Court and the State's argument that any proceeding would be ill-advised prior to a decision in Strickland v. Washington, U.S.Sup.Ct. Case No. 82-1554, Oral Argument January 10, 1984, because of the conflict between the Eleventh Circuit and the Florida Supreme Court therein. Id., at n.2;n.3. At the time of this writing said order of the District Court is pending on motions for rehearing filed by both parties.

On January 17, 1984, Justice Powell granted a timely application for an extension in which to file the present petition. See, U.S. Sup.Ct. R. 29.1.

V

SUMMARY OF ARGUMENT

A.

This Court has jurisdiction because, the present cause presentes an actual substantial case or controversy between adverse interests. The underlying controversy will recur and is continuing. Furthermore, the controversy is of critical importance to the comity doctrine and the proper administration of state criminal justice systems and the Federal Circuit Courts are deeply divided as to the proper rule. Yet because of the short term nature of the present interlocutory order and the limited appeal from this interlocutory order, the present controversy is, "capable of repetition yet evading review."

B.

This Court has jurisdiction under Rule 17 because the present decision is

in direct conflict with decisions of the Fourth, Fifth and Eighth Circuits holding that a federal court must accept a waiver of exhaustion by the State. Furthermore, the present decision permitting a waiver of exhaustion is also in express conflict with decisions of the First, Second, Third, Sixth, Ninth and Tenth Circuits which have held that the exhaustion requirement under Rose v. Lundy, may not be waived. The present decision is also a misconstruction of Rose v. Lundy and is directly in conflict with decisions of the Fifth and Sixth Circuits, requiring that a "mixed petition" must be dismissed.

C.

The present controversy is important to the exercise of this Court's jurisdiction because the controversy is critical to the prompt disposition of the death

penalty cases and one third of those cases arise in the present jurisdiction. The Circuit Court has misconstrued and misapplied the comity doctrine and the power of any federal court to order a state court to conduct a state court proceeding in the face of the State's express statement that it did not wish to proceed with a state proceeding.

D.

The Circuit Court has grievously erred in applying Rose v. Lundy, and refusing to correct or recognize the present abuse of the great writ. Defense counsel made a deliberate tactical choice at the eleventh hour not to seek state remedies readily available. The Defendant by such a choice has waived any complaint of error. Such a tactic is a major cause of abuse of the great writ in the death penalty cases and should be corrected by this Court.

VI.

ARGUMENT

A.

Although the trial court below has issued an order accepting the State's waiver of the exhaustion requirement and denying the Defendant's Motion for a Continuance, the present cause still presents an actual substantial case or controversy between adverse interests. Both parties have filed Motions for Rehearing seeking to set aside or stay the trial court's action in this case.

Furthermore, the present controversy is an issue of critical importance to the immediate proper administration of the state criminal justice systems and the application of the comity doctrine. At the same time the federal circuit courts

are deeply divided as to the proper rule. However, because of the short term nature of the present interlocutory order; the prompt disposition of state remedies by the State Court system and the limited appeal from this interlocutory order, the present controversy is, "capable of repetition yet evading review." See, Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498 (1911). It is apparent in the present case and in the decisions noted in Knight v. Wainwright, and Arango v. Wainwright, infra that the present matter will continue to block the proper administration of the State's criminal justice systems. This Court therefore has jurisdiction and should exercise jurisdiction in this most important issue.

B.

In Felder v. Estelle, 693 F.2d 549, at 554 (5th Cir. 1982) in requiring the federal district court to accept a waiver of the exhaustion requirement by the State, the Court concluded:

> "We see no reason why a federal court, in the name of comity, should refuse to abide by the State's wishes. This conclusion is supported by our proper relations between sovereign states, rather than between judicial systems."

Similarly, in Tolg v. Grimes, 355 F.2d 92, at 97 (5th Cir. 1966) in accepting a state waiver of exhaustion and rejecting any notion that the cause should be continued for further exhaustion of state claims the court explained:

> "[W]e think it is entirely permissible for the State to waive the failure to exhaust State remedies if it recognizes, as it apparently does in its presentation to this

Court, that substantial justice will be furthered by such waiver."

Bolstering the foregoing analysis, in Jenkins v. Fitzberger, 440 F.2d 1188 at 1189 (4th Cir. 1971) the Court required the Maryland District Court to accept the State's waiver, reasoning that:

> "Concluding that there is not substantive merit to any of Jenkins' claims, the state, through its lawyer, the Attorney General, has clearly made that choice here and for good reason. A dismissal on the merits may prevent the possibility that the state would be required to answer a new petition in the state courts and a subsequent one in the federal courts. We think the court's dismissal for failure to exhaust places an unnecessary burden on both the petitioner and the State of Maryland." [Emphasis added].

Jenkins has been cited with approval in decisions which are binding upon the Eleventh Circuit. See, West v. Louisiana,

478 F.2d 1026 (5th Cir. 1973)(Part IV citing Jenkins) affirmed in part, 510 F.2d 363 (5th Cir. 1975)(en banc); Messelt v. Alabama, 595 F.2d 247 (5th Cir. 1979); Cf; also, Blackwell v. Wolff, 454 F.2d 48 (8th Cir. 1972). Despite this the Eleventh Circuit declined to adhere to these decisions and is direct conflict therewith.

Furthermore, the First, Second, Third, Sixth, Ninth and Tenth Circuits have expressly held contrary to the present decision, that exhaustion of State remedies may not be waived by any party under any circumstance. See, Dicarelli v. Gray, 543 F.2d 466, 471 (3d Cir. 1976) (en banc); United States ex rel Trantino v. Hatrick, 562 F.2d 86, at 96-97 (3d Cir. 1977); United States ex rel Sostre v. Festa, 513 F.2d 1313, 1314 at note 1

(2d Cir. 1975); Needel v. Scafati, 412 F.2d 761 at 765-766 (1st Cir. 1979); Bowen v. Tennessee, 698 F.2d 241 (6th Cir. 1983)(en banc); Batchlor v. Cupp, 693 F.2d 859 (9th Cir. 1982). Naranjo v. Ricketts, 696 F.2d 83 (10th Cir. 1982). The present decision therefore presents a real conflict upon a substantial question which can only be resolved by this Court.

Furthermore, a federal court cannot properly order a continuance and grant a stay of execution to permit a defendant to raise unexhausted claims in state court. In Bowen v. Tennessee, 698 F.2d 241 (6th Cir. 1983) the Sixth Circuit sitting en banc and relying upon Duckworth v. Cowell, 455 U.S. 996 (1982) and Rodriguez v. Harris, 455 U.S. 997 (1982) held that a federal Court has no discretion but rather must dismiss a mixed petition:

> "[T]he unambiguous language of Duckworth and Rodriguez leaves no doubt that an appellate court is without discretion to review cases of mixed petitions and must remand such actions to the district court with instructions to dismiss."

Rodriguez and Duckworth each ordered the Second Circuit Court and the Seventh Circuit Court, respectively, to remand and dismiss mixed petitions upon the authority of Rose v. Lundy, supra. Accord, Galtieri v. Wainwright, 582 F.2d 348, at 355-360 (5th Cir. 1978)(en banc). The present Circuit Court is bound by Rose and Galtieri and the direction in Rodriguez and Duckworth. However, the continuance mechanism approved by the Court below flies into the face of both the rule and policy of Rose v. Lundy. In sum, the State is ordered to proceed where it has expressly declined to proceed and where counsel has made a

deliberate tactical choice not to file in State Court. Comity and the notion of respect for state judgments thereunder have become an illusion in such a circumstances.

Additionally as noted, the present opinion permitting a continuance in the face of the State's express wishes to the contrary is a direct order to the State to proceed with a state collateral proceeding in state court. Hoskins v. Wainwright, 485 F.2d 1186 (5th Cir. 1978); Dixon v. Beto, 472 F.2d 598 (5th Cir. 1973); Anderson v. Beto, 469 F.2d 1076 (5th Cir. 1972), and Clarke v. Henderson, 465 F.2d 888 (5th Cir. 1972), expressly prohibit a federal Court from ordering a state collateral proceeding. This cause must therefore be reviewed by this Court because of the substantial

conflict with both the substantive law and manifest federal policy to the contrary.

C

The importance of the present controversy cannot be overstated. In McKaskle v. Vela, __U.S.___, 34 Crim.L. Rep. 4144 (1984) in dissenting from the denial of certiorari Justice O'Connor joined by Justice Rehnquist and the Chief Justice, specially noted the critical nature of the proper application of the exhaustion and comity doctrine:

> "This petition presents the important question whether the exhaustion rule in 28 U.S.C. §§2254(b)(c) prohibits federal courts from considering federal habeas petitions that contain specific allegations of error that are integral to the constitutional challenge but were not raised in the state courts. Because the question has great significance for the relations between federal and state courts, I would grant the petition for certiorari.

* * *

"Whatever the correctness of the Court of Appeals''ineffective assistance" determination, see Supp. App. E2-E8, this petition raises an issue of considerable importance to the administration of federal habeas corpus. The Fifth Circuit's consideration of factual allegations not specifically raised in the stae court undermines the policies behind the requirement that state remedies be exhausted before federal habeas corpus relief becomes available."

The present "exhaustion" issue is even more critical because it is directly related to the prompt disposition of the death penalty cases and one-third of those cases arise in the jurisdiction of the Eleventh Circuit. See, A47 at n6. As previously noted, State seeks to waive exhaustion to avoid unnecessary delay and chronic avoidance of justice, a critical problem in death penalty and other serious criminal cases. See, Barefoot v. Estelle, __U.S.__, 103 S.Ct. 3383 (1983);

see, also, Rose v. Lundy, __U.S.___, 102 S.Ct. 1198 at 1205 (1982) quoting, Sanders v. United States, 373 U.S. 1 at 18, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963). Compare, Knight v. Wainwright, U.S.So.D. Ct. Case No. 81-391-CIV-JE, opinon filed March 5, 1981 (A71-A76)[Muhammad (a.k.a. Knight) v. State, 426 So.2d 533 (Fla. 1983)(on exhaustion of state remedies) cert. denied, ___U.S.____, 104 S.Ct. 199 (1983), rehearing denied, __U.S.___, 104 S.Ct. 539 (1983)]. However, the "right" of the State to waive exhaustion to insure speedy justice is a hollow right indeed, where it rests purely upon the discretion of the federal trial court and such whimsical and arbitrary factors as the condition of the federal and state dockets. The state and federal system is not a "two tiered" system as the present opinions suggests, meaning that the state

court system is somehow on a lower "tier." Comity, is a doctrine which repudiates such a concept and is designed solely for deference to the State Courts. Concomittantly, if the State and its courts chose not to invoke comity, the federal Courats should be bound by that decision. There is no theory of comity by which a federal Court should tell a state Court system, "We-know-better." Such analysis is repugnant to the very theory of respect upon which comity is based. The present opinion is therefore a substantial departure from the accepted or usual course of judicial proceedings and the foregoing decisions and must be reviewed by this Court.

D

Finally, the State submits that the Defendant's unexhausted claims should be

rejected as an abuse of the writ and waived by counsel's deliberate tactical choice. See, Jordan v. Procunier, ___F. Supp.____(E.D.Va. 1983, 34 Crim.L.Rep. 2033). The present circumstance exists not from any error by the State or federal courts, but because defense counsel, an experienced defense lawyer, and a former Assistant Public Defender in Miami, Florida, made a deliberate eleventh hour choice not to seek remedies readily available in the State Court system. See, Knight v. State, 394 So.2d 997 (Fla. 1981). Counsel instead obtained a stay in federal court without notice to the State and guaranteed delay and frustration of the State judgment by deliberately and knowingly raising unexhausted claims. Such a tactic is a major cause of delay and abuse of the writ in the death penalty cases. See,

Knight v. Wainwright, supra; compare also, Arango v. Wainwright, 563 F.Supp. 1181 (S.D. Fla. 1983)(Court denies motion to continue in order to exhaust state remedies), reversed, for exhaustion, Arango v. Wainwright, 716 F.2d 1353 (11th Cir. 1983)(adopting the present approach).

The Court below rejected the State's complaints with regard to the tactics of counsel, asserting that there was no rule or policy prohibiting such piecemeal and delaying tactics and that defense counsel was only trying to obtain one federal proceeding ultimately. A16-A21. Contrary to the Circuit Court view, a defendant may not litigate in any court a constitutional claim that counsel deliberately forfeited before the state Court. See, Engle v. Isaac, __U.S.___, 102 S.Ct. 1558 at 1570 and note 28 (1982). Additionally,

in Rose v. Lundy, 102 S.Ct. at 1205, quoting Sanders v. United States, 373 U.S. 1, at 18, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963) the Court endorsed the rule that:

> "[I]f a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reasons, he may be deemed to have waived his right to a hearing on the second application presenting the withheld ground. The same may be true if, as in Wong Doo, the prisoner deliberately abandons one of his grounds at the first hearing. Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay."

The present cause demonstrates a deliberate decision to not assert constitutional rights or constitutional objections in state Court, which decision was necessarily entrusted to the Defendant's

attorney. The trial court therefore erred such a theory where counsel then must assert the unexhausted claims. Cf., Rose v. Lundy, 102 S.Ct. at 1204-1205 (Section "IIIC"). The present tactic designed for delay is an abuse of the writ warranting the dismissal of such claims. See, Rose v. Lundy, supra, at III (C). The Court below has manifestly erred in declining to adhere to Rose v. Lundy and the cause should therefore be heard by this Court.

VII.

CONCLUSION

WHEREFORE, based upon the foregoing, this Court should accept jurisdiction.

RESPECTFULLY SUBMITTED, on this_____ day of February, 1984, at Tallahassee, Leon County, Florida.

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APPENDIX TO

BRIEF OF PETITIONER ON JURISDICTION

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-365-CIV-JCP

WILLIAM LEE THOMPSON,)

Petitioner,)

vs.)

LOUIE L. WAINWRIGHT,)

Respondent.)

_____)

AMENDED ORDER GRANTING PETITIONER'S APPLICATION FOR CONTINUANCE AND PERMITTING AN APPEAL UNDER RULE 5 OF THE FEDERAL RULES OF APPELLATE PROCEDURE

On February 24, 1982 petitioner filed his petition for Writ of Habeas Corpus.

The petitioner includes only exhausted claims but petitioner has applied for a continuance of hearing on the merits of the petition until he has filed and fully prosecuted in the Florida courts his

unexhausted claims. These unexhausted claims challenge the entry of the guilty plea as being involuntary and assert ineffective assistance of counsel. The respondent opposes this application.

Three options have been considered to resolve this situation. First, since the application for continuance was filed concurrently with the petition, the Court could construe this as being a mixed petition. Then the petition would have to be dismissed in accordance with Rose v. Lundy, 102 S.Ct. 1198 (1982).

The second option is also a corollary of the holding in Rose. If the application for continuance is denied prceedings would continue until a decision was reached on the exhausted claims. Alternatively, if the petition was dismissed as containing

exhausted and unexhausted claims, the petitioner, under Rose, has the choice of returning to State Court to exhaust his claims or of amending the petition to present only exhausted claims. Should petitioner proceed in this court with his exhausted claims, it is conceivable that he will return with a second petition when he subsequently exhausts his now unexhausted claims. Since that would result in an attack on first his sentence and later an attack on his conviction, that option appears unsatisfactory. But the rejection of that option at this time should not be contrued as a finding that the petitioner could filed a subsequent petition without risking dismissal under Rule 9 of the rules governing Section 2254 cases.

The third option is to grant the application for a continuance of the hearing on the merits. This seems most consistent with the underlying policies of the exhaustion requirement when applied to a death penalty challenge. It will accomplish the same result as the first option.

The exhaustion requirement is a judicial doctrine, now codified, to further the notions of comity that arise in a dual system of government. "...(f)ederal District Courts ought to dismiss mixed petitions so that petitioners will exhaust all their constitutional claims prior to Federal Court intervention. Considerations of comity, avoidance of piecemeal litigation, economy of judicial energy and the fullest consideration of a petitioner's claims are best served if all of a petitioner's claims are present to the STate

Court system at one time... The goal is to have a petitioner travel through each system only once, at most, in quest for vindication of alleged constitutional errors." Galtieri v. Wainwright, 582 F.2d 348 (5th Cir. en banc 1978) at p.356. "Consequently, one federal proceeding embracing all claims can be attained only by requiring a petition to submit all of his claims to the State Courts before he seeks federal habeas corpus relief." Galtieri at p.357.

While continuing the federal petition allows Mr. Thompson to proceed through the state system a second time, it is preferable to have partial fulfillment of the goal than none at all. Under the circumstances recountered in the application for continuance, it appears that petitioner could not have raised these grounds to

challenge his conviction until there was a change of counsel. Unless the petitioner is granted relief by the Florida Courts, the outcome of the procedure will more than likely be the same as if the petition was dismissed in accordance with the first option. Either way the petitioner may exhaust his claims in State Court. Thereafter all of the petitioner's claims can be dealt with at one time.

It is recognized that the third option is more beneficial to the challenge to a death sentence than when the underlying conviction is at issue. It is of advantage to the death row inmate to indefinitely continue a federal habeas petition while time is spent litigating unexhausted claims. The continuance in itself is a partial victory by maintaining the status quo of imprisonment.

The concerns of Justices Blackman, White and Stevens in Rose v. Lundy, are not as relevant when the challenge is to the death penalty as opposed to a sentence of confinement. When liberty is in question, the habeas petitioner has an incentive for the Federal Court to hear its most meritorious constitutional claim as quickly as possible. The total exhaustion requirement can thwart both the petitioner's and society's interest in swiftly redressing unconstitutional confinements. But where the death penalty is involved any delay can only work to the petitioner's advantage. While it is more difficult to measure the impact on societal interest, there is no doubt that such delays result in inciting a hue and cry from the public.

The Court is reluctant to institute any unnecessary delay in this process and is

sympathetic with the public's negative perceptions of such delay. But on the face of the record before the Court, which at this time contains the petition, application for continuance and the response to the application, it is perceived that the petitioner is making a good faith effort to litigate the entirety of its substantial constitutional claims in one federaL proceeding. More than likely, the time utilized at this juncture to determine whether there as been an abuse of the writ would not be prudently spent.

However as reflected in the foregoing analysis, the present issue involves a substantial and controlling issue of law as to which there is substantial ground for difference of opinion. An immediate appeal from the present order may materially advance the ultimate termination of the litigation. It is therefore,

ORDERED and ADJUDGED, that the Petitioner's application for a continuance pending the prosection of this unexhausted claims in the Florida Courts is granted. It is further,

ORDERED and ADJUDGED, that within the meaning of Rule 5 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 12^2(b) the Respondent is granted permission to seek immediate review of the present order.

DONE and ORDERED in Miami, Dade County, Florida this 7th day of June, 1982.

UNITED STATES DISTRICT JUDGE

cc Proposed Copy: Michael VanZampt

cc: Michael VanZampt
Calvin L. Fox

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-6052

WILLIAM LEE THOMPSON,

Petitioner-Appellee,

vs.

LOUIE L. WAINWRIGHT,

Respondent-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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(September 6, 1983)

Before GODBOLD, Chief Judge, KRAVITCH, Circuit Judge, and MORGAN Senior Circuit Judge.

GODBOLD, Chief Judge:

In this habeas corpus case brought by a Florida state prisoner under sentence of death we decide three issues. We hold that a district court having before it a habeas petitioner containing only exhausted claims may continue the case at the petitioner's request pending his presenting to the state courts other claims that are not included in the petition and have not been exhausted. We hold that the state of Florida through its attorney general may waive the requirement of 28 U.S.C. Sec. 2254 that a petitioner seeking federal habeas corpus must first exhsut state remedies. And we hold that the district court, in its discretion, may accept or reject the state's waiver.

Based on his guilty plea, petitioner Thompson was convicted in Florida court of first degree murder, kidnapping and sexual battery. As recommended by the sentencing

jury, the trial judge imposed the death sentence. The Florida Supreme Court affirmed Thompson's conviction and sentence on direct appeal, placing special emphasis on the extreme brutality of the crime. Thompson v. State, 389 So.2d 197, 200 (Fla. 1980). The sentencing court summarily denied Thompson's subsequent motion for collateral relief under Fla. R. Crim. P. 3.850 (West Supp. 1983), and the Florida Supreme Court affirmed. Thompson v. State, 410 So.2d 500 (Fla. 1982). Throughout all these state proceedings Thompson was represented by his trial counsel.[1]

Only days before his scheduled execution Thompson secured new counsel. The new attorney filed a petition for habeas corpus

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[1] This is the chronology of Thompson's cases:
March 1976 offense committed;

in federal district court, and that court granted a stay of execution. The petition raised numerous constitutional allegations previously addressed to the state courts. Contemporaneously Thompson's attorney filed a motion for continuance, (a postponement of any further proceedings), setting out that there were two grounds for post-conviction relief that were not alleged

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(Footnote 1 continued)

Sept. 1978:	conviction and sentence;
Nov. 1980:	affirmed by Florida Supreme Court;
July 1981:	motion to vacate filed, state trial court;
Aug. 1981:	motion denied without hearing;
Jan. 12, 1982:	commutation hearing before governor of Florida;
Feb. 5, 1982:	death warrant signed for execution on March 2, 1982;
Feb. 11, 1982:	denial of motion to vacate affirmed, Florida Supreme Court;
Feb. 24, 1982:	petition for habeas corpus and motion to continue hearing, filed federal district court;

in the habeas petition (entry of an involuntary and unintelligent guilty plea and ineffective assistance of counsel); that these grounds had not been raised earlier because petitioner had been represented throughout previous proceedings by trial counsel; and that these issued needed to be raised in the first instances in state post-conviction proceedings.

The respondent, secretary of the Florida Department of Corrections (hereinafter "the state"), represented by the Florida attorney general, opposed to motion for

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(Footnote 1 continued)

Feb. 25, 1982:	stay of execution granted federal district court;
April 1982	federal district court order granting continuance;
Oct. 1982	permission to appeal granted by this court, appeal expedited.

continuance on the ground of deliberate bypass, see Fay v. Noia, 372 U.S. 391, 439 (1963), and abuse of the writ, see Rules 9(a) and (b) of Rules Governing Sec. 2254 Cases in U.S. District Courts; Sanders v. U.S., 373 U.S. 1, 15-23 (1963).

The court conducted a hearing. The attorney general notified the court that the state waived exhaustion of the two unexhausted claim.[2]

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[2] Petitioner contends that the attorney general did not timely tell the court that the state waived exhaustion. If this has any legal significance, it is laid to rest by an order later entered by the district court granting a stay pending appeal. In this order the court recites that the state has waived exhaustion, and referes to an affidavit by the attorney general that placed notice to the court of waiver as having been given before the order granting a continuance was entered. This is a sufficient finding, express or implied, that the court was timely notified that the attorney general waived exhaustion.

The court granted the continuance on the ground that this was the action most consistent with the underlying policies of th exhaustion requirement as applied to a death penalty challenge. The court noted that Thompson had been unable to reaise the two new claims until he changed counsel and that he appeared to be making a good faith effort to litigate all of his constitutional claim in one federal case. The court did not give effect to, or even refer to, the state's waiver.

The court certified the case for interlocutory appeal under 28 U.S.C. Sec. 1292(b) and at the request of the state stayed its order pending appeal. We granted leave to appeal.

Before this court the state continues to assert on bypass and abuse of the writ

grounds that the court should not have postponed further action on the federal petition. Its main point is however, that the court erred in not giving effect to the state's waiver of exhaustion.[3] Citing its interest in prompt final determination of the validity of convictions and sentences rendered in its courts, the state says that as a matter of policy it wishes to have available to it the discretion of explicitly waive exhaustion in habeas cases. Moreover, the state contends that once such a

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[3] The two unexhausted state claims are not included in the federal petition. However, petitioner has triggered federal jurisdiction and has expressed his desire to have all constitutional issues settled in the one federal proceeding. Should the court accept the state's waiver, it can marshal the issues and require petitioner to amend to bring in the non-exhausted claims, thereby affording both state and petitioner the single plenary adjudication that both seek.

waiver is asserted the federal district court is bound to accept it. These two prongs of the waiver of exhaustion issue go to the heart of the two-tier state-federal system of review of the constitutionality of state criminal convictions and sentences. They implicate the principles of comity and of federalism that underly the two-tier review. And they involve the search for finality in criminal cases.

I. The power of the court to delay the federal proceedings. The state's contention that the district court had no power to grant a continuance of the habeas petition pending before it, or abused its discretion in doing so, is patently without merit. The court has the power to control its docket. So long as it abides by the limits of discretion, it can leave a habeas petition dormant on its docket while the

petitioner presents to the state court unexhausted claims.

The express aim of the district court, set out in its carefully phrased order, was to enable all constitutional claims to be settled in one federal habeas proceeding. Rose v. Lundy, 455 U.S. 509 (1982), does not forbid the continuance. The petitioner did not file a mixed petition seeking ruling on his exhausted claims. To the contrary, he asked that ruling on his exhausted claims be withheld until unexhausted claims could be presented to the state court and then all claims, properly exhausted, considered in the federal court at one time. This furthers the interests underlying Rose rather than impedes them.

The district court could have denied a delay, decided the issues that were alleged

in the petition, and left Thompson to the risks of a second federal petition on the two new claims. But no rule or policy required it to do so.

The state's objections to the continuance order are dubious. It argues that under Fay v. Nois Thompson deliberately bypassed state courts by "filing" his unexhausted claims in federal court instead of state court. The short answer is that Thompson did not file his unexhausted claims in federal court but rather seeks to get them ruled on in state court. The state raised an abuse of the writ argument, but declined to pursue it after noting that petitioner was making a good faith effort to avoid piecemeal letigation and ot attain the desirable end of one single, plenary federal proceeding.

In its brief the state contends that the motion should have been denied because petitioner failed to raise the issues in his first motion for collateral relief in state courts and because eventually, when presented to the federal court, the two new claims would be barred by Wainwright v. Sykes, 433 U.S. 72 (1977). At oral argument the state acknowledged that petitioner violated no state procedural rule by failing to raise the two new claims in his first motion for collateral relief and thus that Sykes would not be triggered.

The district court did not err in granting the continuance.

II. The power of the state to waive.

(A) Authority of the attorney general under state law.

Under the Florida constitution, Article 4, Sec. 4, the attorney general is

a member of the cabinet and is "the chief state legal officer" of the executive department. By statute, Fla. St. Ann. Sec. 16.01(2) (West Supp. 1982), he must perform "such other duites appropriate to his office as may from time to time be required of him by law or by resolution of the Legislature." His responsibilities with respect to litigation are covered in subsections (4) and (5) of Sec. 16.01. The attorney general:

> (4) Shall appear in and attend to, in behalf of the state, all suites or prosecutions, civil or criminal or in equity, in which the state may be a party, or in anywise interested, in the Supreme Court and district courts of appeal of this state.
>
> (5) Shall appear in and attend to such suites or prosecutions in any other of the courts of this state or in any courts of any other state or of the United States.

It is obvious that the "such suits" in (5) are those described in (4), "all suits or prosecutions, civil or criminal or in equity,

in which the state may be a party, or in anywise interested." The statutory mandate to the attorney general is not merely to appear but to "attend to, in behalf of the state, all suits or prosecutions," etc.

By Florida judicial decisions, the grant of specific state powers to the attorney general does not deprive him of the powers belonging to him under the common law, which include presecuting "all actions necessary for the protection and defense of the property and revenue of the state..." State ex rel. Landis v. S.H. Fress & Co., 155 So. 823, 827 (Fla. 1934). Also, "it is his duty, in the absence of express legislative restrictions to the contrary, to exercise all such power and authority as public interests may require from time to time." Id. Moreover, in Florida the office of attorney general is in many respects

judicial in character, and he is clothed with considerable discretion. Id. at 828.

The attorney general's authority runs beyond responsibility to the government qua government. He is responsible to the people. "The Attorney-General is the attorney and legal guardian of the people, or of the crown, according to the form of government." State ex rel. Davis v. Love, 126 So. 374, 376 (Fla. 1930). When occasion arises "it is his duty to use means most effectual to the enforcement of the laws, and the principal law officer of the state." Id. at 377.

We conclude that under these powers granted by Florida common law, statutes and case law, the state's attorney general had the authority to expressly waived exhaustion of state remedies so that all

claims could be presented and decided in one federal proceeding. Florida law gives the attorney general authority to waive exhaustion whether exhaustion, as we hold, promotes the interests of the state as sovereign or, as some other courts have held, promotes only the interests of state courts. See note 11 and accompanying text infra. We hold that, so far as state law is concerned, the attorney general had authority to speak for the interests of state courts and judges as well as the other instrumentalities of Florida state sovereignty. We believe that if the Florida courts were presented with these same questions they would reach the same conclusions.

(B) Power of the state to waive - federal law

This brings us to consideration of whether principles of federal law will

deny effect to the state's waiver exercised through its attorney general as authorized officer. This requires us to examined the principles of comity and federalism that underlie the two-tier system of collateral review and the exhaustion requirement that has been carried forward into 28 U.S.C. Sec 2254 (b)-(c) (1976).

(1) The prior history of state waiver of exhaustion

In a long line of cases this circuit, the former Fifth, and the new Fifth have held that in the district court a state, through its attorney general, by express act or by failure to raise the issue, can waive petitioner's failure to exhaust. West brook v. Zant, 704 F.2d 1487, 1492-94 (11th Cir. 1983) (concession in answer that recourse to state courts would be futile); Shaw v. Boney, 695 F.2d 528, 529

n.1 (11th Cir. 1983) (failure to raise); Lamb v. Jernigan, 683 F.2d 1332, 1335 n.1 (11th Cir. 1982) (concession in answer that resort to state courts would be futile); Felder v. Estelle, 693 F.2d 549 (5th Cir. 1982) (express waiver); Houston v. Estelle, 569 F.2d 372, 375-76 (5th Cir. 1978) (statement in answer: "Respondent does not contend that Petitioner has failed to exhaust his state remedies."); Hopkins v. Jarvis, 648 F.2d 981, 983 n.2 (5th Cir. 1981) (Unit B) (exhaustion raised in answer, magistrate held petitioner had exhausted, issues not raised before district court on review of magistrate's report and recommendations; held waived); Messelt v. Alabama, 595 F.2d 247, 249-51 (5th Cir. 1979) (failure to raise); West v. Louisiana, 478 F.2d 1026, 1034-35 (5th Cir. 1973) (failure to raise), aff'd in pertinent part, 510 F.2d 363 (5th Cir. 1975) (en banc).

The court of appeals may treat the waiver before the district court as effective and consider the unexhausted claims even though on appeal the state argues non-exhaustion. Messelt v. Alabama; West v. Louisiana. See generally, Comment, State Waiver and Forfeiture of the Exhaustion Requirement in Habeas Corpus Actions, 50 U. Chi. L. Rev. 354 (1983).

A number of the foregoing cases involve "futility of exhaustion," where there is ineffective state process or an absence of available state process. There are exceptions to exhaustion that have been codified in Sec. 2254(b). It is obvious that when futility is contested there is no waiver of exhaustion. But when the state affirmatively acknowledges futility, or expresses uncertainty, its statement is often considered under the rubric of waiver and

accepted without analysis of whether the acknowledgement is substantively correct. Similarly, the state may be asked to take a position on futility and may not respond, and its silence then may be treated as waiver.

At the appellate level we have treated as a waiver the state's failure to raise exhaustion on appeal, Shaw v. Boney, (failure to raise in district court and on appeal); Lamb v. Jernigan, (same), and its concseeion that resort to state courts would be futile. Warren v. Conner, 365 F.2d 590, 591 (5th Cir. 1966) (vigorous assertion of failure to exhaust; supplemental statement recognizing uncertainty of state remedies accepted as waiver); Tolg v. Grimes, 355 F.2d 92, 95, 97-98 (5th Cir. 1966) (non-exhaustion argued in district court but concession on appeal that recourse to state

courts would be futile). Recently we have accepted an express waiver of exhaustion addressed to the courts of appeal. Corn v. Zant, ___F.2d___ (11th Cir. 1983); Westbrook v. Zant.

In Felder v. Estelle, a post-Rose v. Lundy decision, the Fifth Circuit held that the district court erred in holding that the Texas attorney general could not, on behalf of the state, expressly waive failure to exhaust in a mixed petition case.[4]

Felder recognizes that some cases concern "waiver by negligence" or inaction

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[4] Felder remanded to the district court with instructions to accept the waiver and reach the merits. We leave it in the discretion of the district court whether to accept the waiver. See Parts III and IV, infra. Compare Sweet v. Culp, 640 F.2d 233 (9th Cir. 1981), discussed infra.

while in others the waiver is express. 693 F.2d at 554 n.4. Some of the "waiver by inaction" cases are bottomed on what might be called a strict pleading approach. Resorting to principles of estoppel applied generally to other litigants and defenses, the court concludes that the state has waived exhaustion by failing to raise the issue, either in district court or on appeal.[5] Although we prefer to rest our decision on the broader ground that the nature of comity, as incorporated by Sec. 2254 exhaustion, permits the state attorney general to waive exhaustion expressly

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[5] Judge Merritt, dissenting in Bowen v. Tennessee, ___F.2d___, ___(6th Cir. 1983) (en banc), has set out the reasoning that underlies this approach:

> Rule 5 of the rules governing habeas corpus cases in the District Court adopted by the Supreme Court on April 26, 1976, 28 U.S.C. Sec. 2254, requires the defendant to set out in its answer its position respecting exhaustion of state remedies. Rule 11 of those rules

on behalf of the state, see Part II, B, (2) infra, the strict pleading cases provide useful guidance. These cases imply the validity of two important conclusions. First, exhaustion is not an inflexible rule of subject matter jurisdiction that the court must raise sua sponte but is rather subject to waiver and estoppel. Second, the state attorney general may waive exhaustion on behalf of the state.

As Felder points out, 693 F.2d at 554 n.4, to treat express waivers differently from waivers by inaction "would only lead to illogical and unmanageable results."

(Footnote 5 continued)

> makes the Federal Rules of Civil Procedure applicable. Rule 12(h), Fed. R. Civ. P., provides that the failure to raise a defense other than subject matter jurisdiction shall constitute a waiver of the defense. The defendant by failing to raise the point below has waived its claim that a mixed petition should be dismissed.

It would make no sense, and indeed invite deviousness and uncertainty, to hold that an attorney general cannot do advisedly what he can do accidentally. Moreover, we have described a third type of case, closely related to an express waiver, where the attorney general, in discharge of his duty as an officer of the court, expresses uncertainty over whether adequate state remedies are available or points out that resort to state courts may be futile, and his expressions are accepted as a waiver of exhaustion. Westbrook v. Zant; Lamb v. Jernigan; Tolg v. Goins; Warren v. Conner.

In Westbrook v. Zant, for example, the state's answer declared that recourse to state courts on petitioner's unexhausted claims would be futile and went on to address the merits of the unexhausted claims. Further, the state did not mention non-ex-

haustion in objecting to the district court's ruling on the merits of petitioner's unexhausted claims. Citing Galtieri v. Wainwright, 582 F.2d 348, 356 n.15 (5th Cir. 1978) (en banc), the court held that once a district court has reached the merits of an unexhausted claim and appeal is taken, the appellate court must also entertain the merits. 704 F.2d at 1494.

But the court did not rely on Galtieri alone. It mentioned that on appeal, at oral argument, the state expressly waived exhaustion. Noting the state's consistent position on exhaustion at both the district court and appellate levels, the court states: "[The state] obviously seeks resolution [of the unexhausted claims] on the merits." Id. In accepting the waiver made by the attorney general on behalf of the state, the court did not rely on a pleading

approach. Rather, it focused on the considerations of comity that lie at the heart of Sec. 2254 exhaustion. After concluding that Rose v. Lundy did not preclude the state from waiving exhaustion, the court stated:

> In our view, holding that a state may waive exhaustion does not run contrary to the policy considerations of federal-state comity underlying total exhaustion of all constitutional claims initially in the state courts.

704 F.2d at 1494. Beacuse Westbrook rests in part on the nature of comity and exhaustion, it lends broad and explicit support to the two conclusions that (1) exhaustion is waivable (2) by the state attorney general.

Finally, Supreme Court cases in areas analogous to habeas exhaustion reinforce the two conclusions mentioned above. The federal habeas rule relating to procedural defaults occurring in state court, see

Wainwright v. Sykes, 433 U.S. 72 (1977), provides one analogous situation. Even though the Sykes rule is, like exhaustion, founded in part on considerations of comity, the Supreme Court has refused to consider the Sykes issue because the state, through its attorney general, has failed to raise it. See Estelle v. Smith, 451 U.S. 454, 468 n.12 (1981); Jenkins v. Anderson, 447 U.S. 231, 234 n.1 (1980).

Younger absention furnishes another useful analogy. In Younger v. Harris, 401 U.S. 37 (1971), the Court held that except in extraordinary circumstances a federal court must abstain from deciding issues implicated in an ongoing criminal proceeding in state court. The Younger doctrine was subsequently broadened to preclude federal court interference with some types of ongoing civil proceedings in state courts.

See, e.g., Hoffman v. Pursue, Ltd, 420 U.S. 592 (1975). In Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 479 (1977), the state attorney general, appearing on behalf of the state raised Younger abstention before the district court but abandoned the issue before the Supreme Court, "at oral argument. . .resisting the suggestion of [abstention]. . ." 431 U.S. at 479. The Court noted that although the named appellant was the Ohio Bureau of Employment Services, the appellant in effect was the State of Ohio. 431 U.S. at 477. Even though Younger abstention is, like Sec. 2254 exhaustion, a comity-based doctrine that arguably springs from deference to state courts, the Court accepted the state attorney general's decision, made on behalf of the state, to subject voluntarily to federal proceedings. It stated:

> It may not be argued, however, that a federal court is compelled to abstain in every such situation. If the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's system. In the present case, Ohio either believes that the district court was correct [in concluding that abstention was inapplicable] or, faced with the prosepct of lengthy administrative appeals followed by equally protracted state judicial proceedings, now has conclued to submit the constitutional issue to this Court for immediate resolution. In either event, under these circumstances Younger principles of equity and comity do not require this Court o refuse Ohio the immediate adjudication it seeks.

431 U.S. at 480.

Like Westbrook, Hodory holds that comity does not categorically prohibit a state from deliberately waiving a rule designed in part to promote state interests.

(2) The nature of exhaustion and comity. Exhaustion of state remedies is not a concept of subject matter jurisdiction but

rather of federalism and comity, intended to give the state the initial opportunity to decide alleged violations of federal constitutional rights. Hopkins, 648 F.2d at 983 n.2; Felder, 693 F.2d at 552; Houston, 569 F.2d at 375; Westbrook, 704 F.2d at 1494 n.8; Darr v. Burford, 339 U.S. 200, 204 (1950); Fay v. Noia, ___U.S. at___, 83 S.Ct. at 839 (1963) ("The rule of exhaustion is not one defining power but one which relates to the appropriate exercise of power.") (quoting Bowen v. Johnson, 306 U.S. 19 (1939)). 17 Wright, Miller & Cooper, Federal Practice and Procedure, Sec. 4264 (1978). The question is not a federal power but equitable discretion. Houston.

Judge Thornberry, for the Fifth Circuit, in Felder v. Estelle, and Judge Higginbotham, concurring in the same decision, and Judge

Gibbons in his dissenting opinion in U.S. ex rel. Trantino v. Hatrack, 563 F.2d 86, 98, 102-04 (3d Cir. 1977), cert. denied, 435 U.S. 928 (1978), have discussed at length comity as a general principle, and what they have said need not be repeated in full. The doctrine arose in international law where it concerned relationships between independent sovereigns. Bank of Augusta v. Earle, 10 L.E. 274 (1839); Felder, 693 F.2d at 1161; Trantino, 563 F.2d at 193, (Gibbons, J., dissenting). Comity concerns the recognition that one sovereign extends to the legislative, executive and judicial acts of another. Hilton v. Guyot, 159 U.S. 113, 163-64 (1895). As between nations, "[i]t is not the comity of the courts, but the comity of the nation. . ." Bank of Augusta, supra at 308. The doctrine applies to "proper relations between sovereign states,

rather than between judicial systems." Felder, 693 F.2d at 554.

Historically, in the 1960's after Fay v. Noia, federal courts urged states to create adequate first-tier collateral review if they lacked it, on the basis that the states were entitled, and often better able, to have the initial opportunity to review their own cases for constitutional error. The states responded, some by legislatuve acts, some by decisions. On the federal side, if collateral relief was denied in state court it was easier for the federal court to conduct its second-tier review having before it the prior state collateral decision and record. Nothing has happened in the 20 years since that commands a stat to go through the first tier of review in a particular case even though, as Judge Gibbons puts it in his dissent in

Trantino, it is "perfectly willing to have [the] case decided in a federal forum now, for the obvious common sense reason that it must ultimately be resolved in a federal forum in any event." 563 F.2d at 101.

The nature of comity between national and state sovereignties in our federal system, as applied to the exhaustion doctrine in two-tier collateral review, necessarily implies power of the state to waive its right of initial review. Federal support of initial review in the state courts is not primarily to vindicate federal interests. Trantino, 563 F.2d at 95. It is designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings. Rose v. Lundy, 71 L.Ed.2d. at 387. Exhaustion is intended to give the state the opportunity for initial review. In

particular cases the state may decide that its role is better performed, and its judicial proceedings disrupted less, by foregoing the opportunity of initial review. This is especially true where the state system already has performed elaborate initial review for the state petitioner -- as it has for Thompson -- and would be required to crank up its system again to examine his newest claims. The state might wish to invoke the abuse of the writ doctrine, but its judicial system would have to exercise its collateral review jurisdiction in order to consider application of the doctrine. Moreover, findings of abuse of the writ are themselves difficult to sustain because of liberality toward pro se pleaders, changes in counsel, and the instinctive reaction of courts that a petitioner ought to be given a merits ruling on a constitutional issue. Additionally,

a state denail of relief based on abuse of the writ grounds is antithetical to finality simple because it is not on the merits; a federal court may find it erroneous and, in a renewal of the ping pong game, hold that the state court must initially review the merits.

The state, then, must be allowed to assert that it wishes to forego the opportunity for initial review in those instances where initial review operates to its disadvantage. It is entitled to decide that this best vindicates its interests. (We discuss in Part IV our conclusion that the court is not required to accept the state's tender of waiver.) There is an element of Big Brotherism for a federal court to say, with respect to a principle that protects state institutions and values, that as a matter of federal law the state does not have the power to assert a desire

to eschew application of the principle when it operates to its injury. This stands comity on its head and promotes state-federal disharmony. This is not to say that the contour and scope of the comity that exhaustion involves are not federally defined, but rather that a definition which ineluctably bars state waiver is wrong.

Both Felder and Westbrook hold that Rose v. Lundy does not preclude state waiver of exhaustion. Felder, 693 F.2d at 554 (Rose did not "address or even contemplate" the issue of state waiver). Westbrook, 704 F.2dat 1493 ("Rose v. Lundy provides no instruction for the situation where the state fails to raise the lack of exhaustion."). We agree.

In adopting a total exhaustion rule the Court in Rose spoke of the desirability of

giving state cours the opportunity to first pass upon and correct a constitutional violation. The Court stressed the importance of "minimizing friction between our federal and state systems of justice" by allowing the state "an initial opportunity" to act. There is no suggestion that the state's interest cannot be vindicated by passing up the opportunity when it elects to do so or that the extension of the opportunity is in fact an irrevocable mandate that the state court must act first.

Our decision is not limited to habeas cases where the death penalty has been imposed. But the death penalty cases starkly demonstrate the desirability of permitting state waiver of exhaustion. In at least some death penalty cases, construing Rose to forbid waiver will frustrate the goal of that decision, which is the avoidance of

piecemeal litigation by encouraging habeas petitioners to exhaust all claims in state court and present the federal court with a single habeas petition.[6] One of the premises of Rose is that the habeas petitioner desires speedy federal relief on his claim and that requiring plenary state court exhaustion, as a prerequisite to a federal determination, will advance him toward that end. This premise fits the petitioner in confinement under a sentence for years, whose purpose is to gain release from confinement. It does not necessarily fit the

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[6] The Eleventh Circuit has a particularly strong interest in the proper handling of death penalty habeas cases, to assure that the Constitution of the United States has been complied with in the arrest, trial, conviction and sentence of the prisoner and at the same time to assure that institutional and public interests in finality of decision are given correct weight. The number of prisoners under death sentence in the United States is approximately 1,100 to 1,200. Approximately one-third of these are in the three states of the Eleventh Circuit.

prisoner under death sentence whos purpose may be to stay alive.[7] He may desire to delay a final federal ruling by raising in succession a series of unexhausted claims.

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[7] The Supreme Court this term, in a somewhat different context, recognized the possibility that a death row inmate may attempt to use federal habeas review as a vehicle to delay implementation of his sentence. In Barefoot v. Estelle, 51 U.S.L.W. 5189-5191 (1983) (quoting Lambert v. Barnett, 159 U.S. 660, 662 (1895)), the Court stated: "'It is natural that counsel for the condemned in a capital case should lay hold of every ground which, in their judgment, might tend to the advantage of their client. . .'" The Court also discussed procedures that may be used to minimize potential delays. Because, "unlike a term of years, a death sentence cannot be carried out by the state while" federal appellate review is pending and because "federal habeas [is not] a means by which a defendant is entitled to delay an execution indefinitely," id., the Court admonished federal courts to identify cases "where constitutional error requires retrial or resentencing as certainly and swiftly as orderly procedures will permit." 51 U.S.L.W. at 5192. Barefoot hold that appellate courts may adopt expedited procedures in resolving the merits os habeas appeals.

Until the final, ultimate federal determination his sentence may not be carried out because state and federal courts may have to enter stay orders until they can examine the merits of his claims. See Barefoot v. Estelle, 51 U.S.L.W. 5189 (1983). Sending such a petitioner back to the state system to exhaust a new claim gives him a reprieve from finality.[8] Each delay, for its span, is a commutation of a death sentence

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[8] Judge Brown of the Fifth Circuit has aptly described the tension between exhaustion and finality in habeas cases:

> New restrictive rules emerge, nearly all of which are designed to require that the case must have been fully exhausted in the state tribunals as a condition for federal court review. Commendable as those so-called technical rules are in reducing opportunities for abuse of the Great Writ, each has within itself further complications including repeated appeals.

Brown, Is There an End in Sight in the Captain's Spyglass? The Quest for Finality, forthcoming in 48 Air Law & Commerce ___ (1983).

to one of the imprisonment.[9] By waiving exhaustion the state can seek to move the case toward the ultimate federal decision. By accepting or declining the waiver, see Part III infra, the federal court can limit waiver to appropriate cases and issues.[10] No invasion of state interests

9 A congressional committee examining the federal habeas corpus statute has expressed concern over the delays associated with federal habeas review in death cases.

> Another disconcerting situation to which the Conference Committee on Habeas Corpus originally addressed itself was the delays in executing State court sentences in capital cases as a result of habeas corpus applications seeking review of State acourt action. . .

H. Rep. No. 1892, 89th Cong., 2d Sess. 5 (1966).

10 While the district judge in this case was addressing the matter of continuance rather than of exhaustion, in his thoughtful and carefully drawn order he considered Rose v. Lundy, and Galtieri v. Wainwright, 582 F.2d 348 (5th Cir. 1978) (en banc), as applied to the unique characteristics of a death penalty case. He chose the option of a continuance while petitioner exhausts the two new claims because, he found, it

is involved but rather an acceptance by the state that its interests will be suitably vindicated in the federal proceeding. In short, Rose is a tool that protects state and federal interests. It is not a trap for both sovereigns.

The best known case that views comity in our state-federal system differently than we do is Trantino, which holds that exhaustion as an instrument of comity serves interests not of state prosecutors but of state courts and therefore may not be waived by the attorney general of New Jersey. 563 F.2d at 96. Naranjo v. Ricketts, ___F.2d___ (10th Cir. 1982) and Bowen v. Tennessee, ___F.2d___ (6th Cir.

(Footnote 10 continued)

was most consistent with the underlying policies of the exhaustion requirement when applied to a death penalty challenge. Permitting waiver of exhaustion furthers the same considerations though in a different manner.

1983) (en banc) adopt this same rationale. See also Sweet v. Culp, 640 F.2d 233, 237 n.5 (9th Cir. 1981); Needel v. Scafati, 412 F.2d 761, 766 (1st Cir. 1969).

With deference, it seems to us that describing the issue as a choice between the interest of a state prosecutor and interests of state courts asks the wrong question. Rather we believe that the question is more precisely put in two parts: does exhaustion serve the interests of the state and its sovereignty or of only state courts and judges? And, whoever the veneficiary of the state's interests, is the state attorney general authorized to waive for that beneficiary?

With respect to the first question, just as Judge Gibbons, dissenting in Trantino, we have difficulty identifying the doctrine basis for the conclusion that comity in a habeas case means not comity between sovereigns but a different and narrower

comity limited to courts and judges.[11] Of course, the state courts' first opportunity to review is a concept that has originated with one judicial system,[12] the federal, and has impacted on another

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[11] In Rose the Supreme Court did described the role of exhaustion as "to protect the state courts' role in the enforcement of federal law and present disruption of state judicial proceedings." 71 L.Ed.2d at 387. The Sixth Circuit gave particular weight to this language in Bowen v. Tennessee, supra. We believe that this reference to the purpost of exhaustion does not represent the Court's considered judgment that in the context of Sec. 2254 exhaustion comity is limited to the relationship between th judicial branches of state and federal governments.

Even if we were to read the language in Rose literally, it is entirely consistent with our holding that Florida's attorney general is authorized by Florida law to waive the interests of state courts and judges.

[12] The habeas exhaustion requirement originated in judicial decisions. Sec. 2254 was intended simply to codify "existing law as affirmed by the Supreme Court" in Ex part Hawk, 321 U.S. 114, 117 (1944). H. Rep. No. 308, 80th Cong., 1st Sess., A180 (1947) (Reviser's Notes). See Rose v. Lundy, 71 L.Ed.2d 379, 385-386 & n.8 (1982).

judicial system, the state's. But the identity of governmental actors extending and receiving deference is not the measure of sovereignty or of comity between sovereigns. First opportunity to review is extended to judges in New Jersey not merely because they are judges but because they are judges of the state of New Jersey. The interests are those of the state though executed judges. Comity, as reflected in Sec. 2254, undoubtedly promotes the interests of state courts, but this is merely one aspect of comity's broader purpose of maximizing the control that a sovereign state has over its criminal justice system. See Sandalow, Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine, 1965 Sup. Ct. Rev. 187, 213-14; Brennan, Some Aspects of Federalism, 39 N.Y.U.L.Rev. 945, 957-58 (1964); Meador, Accommodating

State Criminal Procedure and Federal Postconviction Review, 50 A.V.A. J. 928, 929 (1964).

There are many identifiable and important state interests implicated in the interplay of the two-tier collateral relief system that reach far beyond the interests of state courts and judges. In the present case the attorney general, as Florida's chief legal officer, is interested in the prompt and affective administration of the state's criminal laws and in finality as a part thereof. The governor has a like interest, particularly in death penalty cases where he has a direct, individual responsibility in the process. The two-tier system of review affects legislative funding for prisons. It inevitably affects the executive department's administration of Florida's penal system. The respondent

in this case is the superintendent of the State Department of Corrections. The attorney general, who must represent the state in its appellate courts and in federal courts, must supply resources -- lawyers and staff support -- in both systems. The state bears part of the financial burden of fees to public defenders and appointed counsel. The citizenry at large have an interest has not been expressed in any "speedy collateral review" statutes, the public of Florida have a great interest in prompt determination of the validity of the convictions and sentences of persons who have undergone trial and have been convicted. Comity requires sensitivity, not indifference, to the full spectrum of state interets implicated by federal-state habeas review. There is a substantial dissatisfaction in our country with the operation of two-tier collateral review. This is not the

place to discuss whether this malaise is justified; the point is that it does not originate from only state courts and state judges and is not limited to assertion of their interests.

Of course, neither public nor governmental desire for prompt finality can diminish the principle that criminal convictions and sentences secured in violation of our national Constitution cannot stand. The federal courts must carry out the responsibility assigned to them in two-tier constitutional review, and when conviction or sentence does violate the Constitution the court must unflinchingly set it aside. The problem addressed in this case is not the scope or the thoroughness of federal review but whether the state through its duly authorized officer can wiave one step in two-tier review in an effort to secure a

more prompt final decision from the forum that predictably will be the ultimate forum on the constitutional issue.

With respect to the second prong of the rephrased question, relating to the authority of the attorney general to waive, we hold that Florida law empowers the attorney general to represent the interests of the sovereign. See Part III, A supra. We hold alternatively that even if comity is limited to state courts and judges, the Florida attorney general has the power to speak for their interests. A contrary holding cannot be reconciled with the state law we have discussed previously. Id.[13] Moreover, state courts and judges are neither parites nor counsel in habeas cases, and if

[13] Trantino assumes, without examination of state law, that the New Jersey attorney general had no authority to appear and speak for the state courts and judiciary to the extent that they might have a special interest in a habeas case.

the state's chief legal officer cannot speak for them, no one can. Refusing to permit waiver by the attorney general is tantamount to a blanket prohibition against waiver of exhaustion, and, in federal habeas cases, converts the flexible concept of comity into a hard and fast jurisdictional requirement. If exhaustion were truly jurisdictional, we could not properly dispense with it as we do in cases where state courts have had the opportunity to address the merits of petitioner's constitutional claims but have not done so. Francisco v. Gathright, 419 U.S. 59 (1974); Houston v. Estelle, 569 F.2d 372 (5th Cir. 1978); West v. Louisiana, 478 F.2d 1026, 1034 (5th Cir. 1973) (long and unjustified delay in the particular case), aff'd in pertinent part, 510 F.2d 363 (5th Cir. 1975) (en banc). We could not accept acknowledgments by attorneys

general that state remedies are ineffective or state procedures futile without examining and ruling on the substantive correctness of each acknowledgment. See Part II, B(1) supra. We could not entertain a petition where there has been an intervening change in state law since petitioner exhausted. Roberts v. LaVallee, 389 U.S. 40, 19 L.Ed.2d 41 (1967). There could not be an "unusual circumstances" exception to exhaustion, such as Trantino itself recognizes. 563 F.2d at 96. "The policies that the exhaustion rule serves are important. . .[but a court] need not make a fetish of exhaustion." 17 Wright, Miller & Cooper, Federal Practice and Procedure Sec. 4264, at 653-54 (1978).

(C) Summary

The prior case law of the former Fifth Circuit, this circuit and the Supreme Court, the nature of comity and exhaustion, and

Florida law coalesce in support of our holdings that exhaustion can be waived and that the Florida attorney general may validly make the waiver decision on behalf of the state.

There is no merit to the argument of petitioner that the state cannot wiave, or the district court accept waiver, because he has an absolute right conferred by Sec. 2254 or the Constitution that his case be given both levels of review. He has no reight to control the operation of the comity-rooted system.

III. Discretion of the district court to accept the waiver.

We hold that the district court in its discretion may accept the waiver of exhaustion in a habeas case as to any one or

more issues or may reject it.[14] The power of the state to decide that exhaustion disserves its interests is not an unqualified right to force the federal forum to litigate all issues without state review.

Comity is not a one way street. "The notion of comity which underlies the exhaustion doctrine must be understood not as a capitulation of federal power to state interest; rather, comity involves a delicate compromise of both state and federal concerns." Carter v. Estelle, 677 F.2d 427, 442 (5th Cir. 1982). Strong federal interests may exist that, balanced against those of the state in the particular case,

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[14] Westbrook did not decide this issue:

> We do not address the issue of whether a district court is bound by a state's waiver of exhaustion when the district court believes exhaustion would not be futile or evidentiary development would be

will permit the district court in its discretion to decline a waiver and require state exhaustion. An unconditional right of waiver would increase the burden on the federal system. In a particular case, fact finding on the issues with respect to which waiver is asserted may be done best in the state court. The complete factual record will aid the federal court in its review. Rose v. Lundy, 71 L.Ed.2d at 388. When state courts initially address requests for collateral relief some cases will never reach the federal courts, for the state courts will recognize constitutional violations and grant relief. Other cases will be abandoned or mooted. Moreover, while Sec. 2254 reflects deference to state fact finding, the exhaustion requirement

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(Footnote 14 continued)

> aided by dismissing the federal petition until the state courts have been given an opportunity to entertain the petitioner's claims.

704 F.2d at 1494 n.9.

increases state courts' familiarity with and hospitality to federal constitutional claims. Id.

Federal courts too have an interest in prompt and effective finality. But the court must have discretion to see whether waiver will further that aim and to balance it with other factors. The court may consider whether extensive or minimal fact finding is involved or only questions of law on an already adequate record and, if fact finding is involved, whether it may be done as part of a federal hearing required on other issues. The court may consider how long since petitioner's conviction and setence were imposed, how long state exhaustion will require, and the comparative status of the dockets of federal and state courts. The court may give weither to whether there are fundamental

state policies at stake in the case or threshold issues of undecided state law. In Sweet v. Culp, 640 F.2d 233, 237 (9th Cir. 1981), the attorney general acknowledged in district court that exhaustion was futile and the district court accepted this as a waiver. On appeal the Ninth Circuit held that the attorney general's concession was not binding on the court and that the district court should have required first-tier state court review of the constitutionality of the state criminal statute whose validity was in question. We agree with this approach.

The federal district court, if it declines to accept the waiver, would not, as the state seems to believe, compel Florida courts to adjudicate the unexhausted claims. It would simply ensure that the state courts have the opportunity to decide those claims,

and the decision would not displace state rules regarding summary dismissals or successive writs.

IV. Conclusion

We turn to the disposition of this case. We hold that the district court had authority to grant the motion for continuance pending exhaustion of Thompson's new claims in state court. We hold that in a habeas case the attorney general of Florida may explicitly waive exhaustion of state remedies on behalf of the state sovereign and the state courts. We hold that the district court, in its discretion, may accept or reject the waiver.

As to the district court's treatment of the waiver, the continuance order itself does not reveal whether the court considered the state's decision to waive exhaustion.

A subsequent order staying the case pending appeal, however, indicates that the district court was aware of the state's waiver when the continuance order was entered but, without discussion, did not accept it. See note 2 supra. We are unable to determine whether the district court's rejection of waiver was proper, because we do not know whether it rejected the waiver because it decided that the state, through the attorney general, could not waive exhaustion or because it thought exhaustion would aid federal review. While we imply no view on whether the court should accept or reject the tendered waiver, it is appropriate that we cacate the decision and order of the district court so that it can again consider, under the principles we have set out, whether to accept or reject the waiver.

VACATED and REMANDED for proceedings consistent with this opinion.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 82-6052

WILLIAM LEE THOMPSON,

Petitioner-Appellee.

versus

LOUIE L. WAINWRIGHT,

Respondent-Appellant.

Appeal from the United States District Court for the Southern District of Florida at Miami

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion September 6, 1983, 11 Cir. 1983, ___F.2d___).

(October 11, 1983)

Before GODBOLD, Chief Judge, KRAVITCH, Circuit Judge and MORGAN, Senior Circuit Judge.

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 82-6052

WILLIAM LEE THOMPSON,

Petitioner-Appellee.

versus

LOUIE L. WAINWRIGHT,

Respondent-Appellant.

Appeal from the United States District Court for Southern District of Florida at West Palm Beach

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O R D E R :

(x) The motion of appellant for (x) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

s/s JOHN C. GODBOLD
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 81-391-CIV-JE

THOMAS KNIGHT,)

Petitioner,)

vs.) ORDER

LOUIE L. WAINWRIGHT, etc., et al.,)

Respondents.)

Pursuant to Section 2254 of the Title 28 of the United States Code, Thomas Otis Knight has filed a Petition for Writ of Habeas Corpus in which he raises several Federal Constitutional questions. Knight is on death row pursuant to a State Court judgment, and the Governor of Florida has issued a death warrant directing Knight's execution, which this Court has necessarily stayed.

The same body of law that compels this Court to entertain Knight's Petition, and concomitantly stay his execution, also directs the Court to require the exhaustion of remedies available to Knight in Florida's courts. 28 U.S.C. §2254(b). That section provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state..." (emphasis added).

Petitioner Knight offers many grounds in support of his assertion that he is in custody in violation of the Federal Constitution. Both Petitioner and Respondent seem to agree that Knight has exhausted his state remedies as to all grounds save one:

the asserted ineffective assistance of appointed counsel at the trial level. Although Knight has attempted to present this issue to the State Courts for their decision, the question of the effectiveness of Knight's trial counsel has never been considered on the merits by Florida's Courts. There is no disagreement between the parites on this point.

However, the Assistant Attorney General representing Respondent has insistently urged this Court to entertain the merits of Knight's Petition "right now." He makes clear that the state does not raise the issue of the lack of exhaustion, but he also careful to assert that the state is not 'waiving' the issue.[1]

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[1] This Court is not at all sure that exhaustion could be waived by a mere announcement of waiver by counsel. Compare

Section 2254, which codified existing case law on the exhaustion doctrine, is rooted in consideration of comity and federalism. The exhaustion doctrine has been fashioned over the years by a policy that counsels one court to defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers have had an opportunity to pass upon the matter.

The United States Fifth Circuit Court of Appeals, which undoubtedly will review

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(Footnote 1 continued)

Tolg v. Grimes, 355 F.2d 92 (5th Cir. 1966) cert. denied, 384 U.S. 988 (1966), Warren v. Connor, 365 F.2d 590 (5th Cir. 1966), and Jenkins v. Fitzberger, 440 F.2d 1188 (4th Cir. 1971), with U.S. ex rel. Trantino v. Hatrack, 563 F.2d 86 (3rd Cir. 1977) cert. denied, 435 U.S. 928 (1978), and U.S. ex rel. Sostre v. Festa, 513 F.2d 1313 (2nd Cir. 1975), cert. denied, 423 u.S. 841 (1975). Here, however, that question is of not real consequence.

this Court's determination in this case regardless of the outcome here, is properly dedicated to the exhaustion doctrine. Judge Ainsworth, writing for th panel in Clarke v. Grimes, 374 F.2d 550 (5th Cir. 1967), has put it thus:

> ...in the exercise of comity and good federalism as well as proper federal-state relations, the ... on [the] question as presented in this case. It would be unseemly in our dual system of government under these circumstances for a federal court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation.

This language from Clarke is particulary appropriate here.

Following the procedure prescribed by the United States Fifth Circuit Court of

Appeals in Clarke, supra, and uniformly followed in other cases throughout the Fifth Circuit, this Court retains jurisdiction for the purpose of continuing the stay of execution previously entered, provided Petitioner Knight immediately files and diligently prosecutes to a prompt conclusion a petition in the Florida state courts which raises those matters included in his Petition before this Court which have not been previously considered and determined in the State Courts.

IT IS SO ORDERED at Miami, Southern District of Florida on this 5th day of March, 1981.

JOE EATON
UNITED STATES DISTRICT JUDGE

cc: Roy E. Black, Esq.
Jesse McCrary, Jr., Esq.
Susan Cary
Fletcher N. Baldwin, Jr., Esq.
Calvin Fox, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-365-CIV-JCP

WILLIAM LEE THOMPSON,)

Plaintiff,)

vs.)

LOUIE L. WAINWRIGHT, etc.,)

Respondent.)

_____)

ORDER

This cause came before the Court upon review of the petitioner's memorandum of law in opposition to waiver of exhaustion, docket no. 47, and the respondent's response, docket no. 49.

The issue before this Court is whether to accept or reject the state's waiver of the exhaustion requirement of 28 U.S.C.

§§2254. On November 23, 1983, this Court requested that the parties brief this issue. Upon review of the materials submitted by the parites and for the reasons set forth below, this Court concludes that the state's waiver should be accepted and the petitioner's motion for continuance should be denied.

The decision of whether or not to accept the state's waiver rests in this Court's sound discretion. Thompson v. Wainwright, 714 F.2d 1495, 1508 (11th cir. 1983). The appellate court's elaborate discussion of comity and the federal and state interests at stake in this case provides the framework for analyzing the factors affecting the exercise of that discretion. Comity involves "a delicate compromise of both state and federal concerns." Id. at 1509,

quoting Carter v. Estelle, 677 F.2d 427, 442 (5th Cir. 1982). No single factor discussed is determinative. The notion of comity entails the process of balancing. Four factors figuring into this process are identified and discussed below, in an endeavor to set forth the grounds upon which this Court has exercised its discretion.

I.

First, the state's decision that waiver will best further its interests is one factor to be considered. The State Attorney General has the authority to represent the interests of state courts and judges. Id. at 1500-1501. "Exhaustion is intended to give the state the opportunity for initial review." Id. at 1504. (Emphasis in the original). Thus, the

state's considered judgment in deciding to forego this opportunity is entitled to some deference. Moreover, "[t]here are many identifiable and important state interests implicated in the interplay of the two-tier collateral relief ssytems that reach far beyond the interests of state courts and judges." Id. at 1507. These interests include the Attorney General's interest in the effective administration of the state's criminal laws and in the conservation of scarce resources -- lawyers and staff support -- in the representation of the state in both state and federal proceedings, the Governor's interest in the prompt execution of death warrants and the Florida citizen's interest in prompt and definite finality. Id. "Comity requires sensitivity, not indifference, to the full spectrum of state interests implicated by federal-state review."

Id. The state's waiver of the exhaustion requirement is an assertion that all of these interests are best vindicated by the prompt resolution of petitioner's claims in the federal forum. That assertion is entitled to some weight in the balance of interests underlying the notion of comity.

Second, the nature and extent of the fact-finding required for proper resolution of petitioner's unexhausted claims does not dictate reference to state courts. Petitioner has stated two unexhausted claims: 1) his guilty pleas was involuntary and unintelligent as it was solely the product of coercion by the co-defendant Surace and 2) his counsel failed to render effective assistance of counsel. Published decisions reveal that the state

court record in this case includes the entry of petitioner's guilty plea, Thompson v. State, 389 So.2d 197 (Fla. 1980), the petitioner's testimony on behalf of the co-defendant Surace, Surace v. State, 378 So.2d 895 (Fla. 3d DCA 1980) and petitioner's attempt to recant his testimony at Surace's trial, Thompson v. State, 410 So.2d 500 (Fla. 1982). There exists, then, a record of many of the aspects of petitioner's claims. There are other aspects of his claims that will require an evidentiary hearing, but this type of hearing is common in the federal courts. See, e.g., Sullivan v. Wainwright, 695 F.2d 1306 (11th Cir. 1983) (Magistrate conducted three day hearings on petitioner's claim of ineffective assistance of counsel). Owens v. Wainwright, 698 F.2d 1111 (11th Cir. 1983) (Magistrate conducted hearing on petitioner's claims of involuntary and un-

intelligent plea and ineffective assistance of counsel). The state estimates that two days will be required for the hearing on petitioner's unexhausted claims. Petitioner intends to offer his own testimony and that of his prior counsel, his co-defendant's counsel. He also intends to introduce evidence of psychiatric examiniations[1] and the background of the victim. This Court concludes that mininal fact-finding will be required to supplement the nearly-complete record and that such fact-finding may be done as part of a federal hearing required on the other issues petitioner has raised

Third, this Court is not persuaded that petitioner's claims involve fundamental

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[1] During the state court proceedings, petitioner was examined by four psychiatrists. Thompson v. State, supra, 389

state polices or threshold issues of undecided state law.[2] For example, these claims do not reaise the issue of the constitutional validity of a state statute, as in Sweet v. Culp, 640 F.2d 233, 237 (9th Cir. 1981).

When faced with a claim that a guilty plea was entered involuntarily, Florida courts have consistently referred to federal law, specifically, Boykin v. Alabama, 395 U.S. 238 (1969) and it progeny. See, e.g., Alder v. State, 382 So.2d 1298, 1300 (Fla. 3d DCA 1980). Holmes v. State,

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(Footnote 1 continued)

So.2d at 199. Presumably, there is a record of their findings and conclusions which could be reviewd by this Court.

[2] The state's argument on this consideration is considerably misdirected. Rather than arguing what state policies or important legal questions would confront the state courts upon review of petitioner's claims, the state argued that important state poli-

374 So.2d 944, 947 (Fla. 1979). Furthermore, the issue itself is largely factual in nature. Owens v. Wainwright, supra, 698 F.2d at 1112-1113. It is highly unlikely that reference of this claim to the state courts would result in any significant evolution of state law.

So too, the Florida courts would look to federal law on the claim of ineffective assistance of counsel. See e.g., Adams v. State, 380 So.2d 423 (Fla. 1980) (reference to federal law in resolving claim of ineffectiveness of counsel). The standards of competence demanded by the federal constituttion and the burden of proof required to establish ineffectiveness have been set forth clearly in this circuit. Washington v. Strickland, 693 F.2d 1243

(Footnote 2 continued)

cies were implicated in its pending writ before the Supreme Court.

(5th Cir. Unit B. 1981) (en banc), cert. granted, ___U.S.___, 103 S.Ct. 2451 (1983).[3] Owens v. Wainwright, supra, 698 F.2d at 1113-1114. King v. Strickland, 714 F.2d 1481, 1458-1486 (11th Cir. 1983).

There is no reason to believe that the state and federal courts would reach different conclusions on petitioner's claims when both would follow the same lines of federal decision. And Florida's familiarity with and hospitality to these federal constitutional claims would not be significantly increased by the requirement of exhaustion in this case.

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[3] That the state is seeking reversal of Washington before the Supreme Court makes no difference in the balance of interests underlying comity. A Supreme Court decision reversing Washington would require reconsideration by the court system first resolving petitioner's claim, be it state or federal.

Fourth, the amount of delay incurred in the state and federal proceedings in this case has been lengthy. The offense was committed in March of 1976. Petitioner was sentenced in September of 1978 and the Governor signed the death warrant in February of 1982. The case was before this Court from February of 1982 until the appellate court asserted jurisdiction in October of 1982. The matter was on appeal from October of 1982 until the Mandate was received in this Court on November 9, 1983. Another appeal to the Eleventh Circuit is likely. Exhaustion will create even more delay, thereby thwarting the interests of promptness shared by the state and federal systems. Compared to the other factors above, this factor alone should be give less weight. Reasoned judicial determination should not be compromised solely in the interests of

speed. Coupled with the other factors, however, consideration of this factor leads to the conclusion that the additional time incurred by continuing this matter for exhaustion would not be well spent.

II.

In view of the conclusion reached by this Court, the appropriate procedure to follow is to set this matter for an evidentiary hearing to consider all of petitioner's claims. In an effort to narrow the issues for the hearing, this Court will issue its pre-trial order and require counsel to follow the procedures set forth herein. Additionally, counsel should provide the Court with relevant portions of the state records.

Accordingly, it is

ORDERED and ADJUDGED that

1. The state's waiver of the exhaustion requirement of 28 U.S.C. §2254 is accepted.

2. The petitioner's motion for continuance is denied.

DONE AND ORDERED at West Palm Beach, Flroida this 10th day of February, 1984.

UNITED STATES DISTRICT JUDGE

cc: Calvin Fox, Esq.
Michael Van Zampft, Esq.

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CASE NO. 83-1421

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Petitioner,

vs.

WILLIAM LEE THOMSPON

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the 11th Circuit

BRIEF OF RESPONDENT ON JURISDICTION

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QUESTIONS PRESENTED

1. WHETHER A FEDERAL COURT MUST ACCEPT THE STATE'S EXPLICIT WAIVER OF THE EXHAUSTION OF STATE REMEDIES REQUIREMENT?

2. WHETHER A FEDERAL COURT CAN PROPERLY ORDER A CONTINUANCE IN ORDER TO PERMIT THE DEFENDANT TO RAISE UNEXHAUSTED CLAIMS IN STATE COURT.

3. WHETHER THE DEFENDANT'S UNEXHAUSTED CLAIMS SHOULD BE REJECTED AS WAIVED BY DEFENSE COUNSEL'S DELIBERATE TACTICAL CHOICE.

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PREFACE

The Petitioner, LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections, was the Respondent in the United States District Court and the Appellant in the United States Court of Appeals for the Eleventh Circuit.

The Respondent herein, WILLIAM LEE THOMPSON, was the Petitioner in the United States District Court and the Appellee in the Eleventh Circuit. In this brief, to avoid confusion, the parties will be referred to as the State and the Defendant respectively.

The following reference is made in this brief:

(A) For the portions of the record below sufficient to show jurisdiction in this Court, which are contained in Respondent's Appendix, consisting of pages A1 - A50.

OPINIONS BELOW

The opinion in the United States District Court for the Southern District of Florida, filed on June 7, 1982, is contained in the Defendant's Appendix at A1 - A4.
This opinion is unreported.

The opinion in the United States Court of Appeals for the Eleventh Circuit is reported as Thompson v. Wainwright, 714 F.2d 1495 (11th Cir. 1983), and contained in the Defendant's Appendix at A5 - A39.

The second opinion of the United States District Court, pursuant to the mandate in Thompson v. Wainwright, supra, filed on February 10, 1984, is contained in the Defendant's Appendix contained at A44 - A50. This opinion is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under provisions of Title 28, U.S.C. §§1257(3) and 2254(b) and (c) and Amendments V, VI and XIV of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISION

Amendment V of the Constitution of the United States provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when an actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI of the Constitution of the United States provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and have the assistance of counsel for his defense.

Amendment XIV of the Constitution of the United States, Section 1, provides that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28, U.S.C., §2254(b) and (c) provides that:

> (b) An application for a writ of habeas corpus in behalf of a person in custody, pursuant to the judgement of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

Title 28, U.S.C., §1651(a) and (b) provides that:

> (a) The Supreme Court and all courts established by Act of Congres may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

STATEMENT OF THE CASE

The Defendant, WILLIAM LEE THOMPSON, after a plea of guilty, was convicted in Florida state court on September 18, 1978, of the crime of first degree murder and sentenced to death by electrocution on September 20, 1978. Defendant's sentence and conviction were affirmed by the Florida Supreme Court on November 6, 1980. Thompson v. State, 389 So.2d 197 (Fla. 1980).

On July 24, 1981, the Defendant filed a Motion to Vacate Judgment and Death Sentence pursuant to Fla.R.Crim.P. 3.850 in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida. The motion was summarily denied without an evidentiary hearing on August 6, 1981. Defendant subsequently filed, in the Florida Supreme Court, an appeal from the Circuit Court's Order denying relief. On February 11, 1982, the Florida Supreme Court affirmed the Order denying relief. Thompson v. State, 410 So.2d 500 (Fla. 1982).

On February 5, 1982, the Governor of Florida denied commutation or clemency and signed a death warrant authorizing Defendant's execution on March 2, 1982, at 7:00 A.M.

The Defendant, on February 24, 1982, filed a Petition for Writ of Habeas Corpus, Application for Leave to Proceed in Forma Pauperis, Application for Stay of Execution, and Memorandum of Law in Support of Defendant's Application for Stay of

Execution. The pleadings were filed with the clerk in the United States District Court for the Southern District of Florida. A copy of the pleadings was served upon the Office of the Attorney General of Florida on that date.

On February 25, 1982, the district court granted the Defendant's Application for Stay of Execution of the Sentence of Death.

When the Defendant filed for habeas corpus relief, he also filed an Application for Continuance of the Hearing on Habeas Corpus Petition. This latter Application requested the district court to permit the Defendant to return to the state trial court and file claims which had not been exhausted in state court and, therefore, not included in the habeas petition. On March 3, 1982, the state filed a brief Response to Motion for Continuance.

On June 7, 1982, the United States District Court granted the Defendant's Motion for a Continuance and directed the Defendant to initiate proceedings in state court to exhaust his state court remedies. (A4). The state then sought interlocutory relief from that order in the United States Court of Appeals for the Eleventh Circuit. Upon review of this interlocutory appeal, on September 6, 1983, the Court of Appeals held that:

1. In a habeas case, the Attorney General of Florida may explicitly waive exhaustion of state remedies on behalf of the state sovereign and the state courts.

2. The district court, in its discretion, may accept or reject the waiver.

3. The district court had authority to grant the Motion for Continuance pending exhaustion of Defendant's new claims in state court. (A38).

On October 19, 1983, the Court of Appeals denied the state's Motion for a Stay Pending Review in this Court. (A 40).

On November 8, 1983, Justice Powell also declined the state's request for a stay of the Eleventh Circuit mandate. See Wainwright v. Thompson, No. 83-1421 (U.S. Nov. 8, 1983).

On November 28, 1983, this Court similarly declined the state's request to stay the Eleventh Circuit Court of Appeals mandate. Id.

Pursuant to the decision of the Eleventh Circuit, on December 8, 1983, the district court requested and received written statements from the state and the Defendant concerning the following matters:

> 1. The nature and extent of the fact finding required for proper resolution of the Defendant's unexhausted claims;
>
> 2. The amount of delay already incurred in this case and reasonably forseeable if the continuance is granted. This consideration involved inquiry into how long it has been since the Defendant's conviction and sentence were imposed, how long state exhaustion will require and the comparative status of the dockets of federal and state trial courts and;
>
> 3. The nature of the legal issues involved; specifically whether there are fundamental state policies at stake in the case, or threshold issues of undecided state law. (A41-42).

On February 10, 1984 by written order, the district court accepted the state's waiver of exhaustion of state remedies and denied the Defendant's Motion for Continuance. (A50).

At this time, the district court has pending motions for rehearing and reconsideration filed by both the state and the Defendant.

SUMMARY OF THE ARGUMENT

ONE

This Court has jurisdiction in this cause, and should accept certiorari because the case presents an actual, substantial case or controversy between adverse interests. This Court has jurisdiction because the decision below is in direct conflict with decisions of the Fourth, Fifth and Eighth Circuits holding that the federal court must accept a waiver of exhaustion by the state. Additionally, the present decision permitting waiver of exhaustion is in express conflict with decisions of the First,

Second, Third, Sixth, Ninth and Tenth Circuits which have held that the exhaustion requirement under Rose v. Lundy, 102 S.Ct. 1198 (1982) may not be waived.

TWO

The question whether a federal district court can properly grant a continuance to permit a defendant to raise unexhausted claims in the state court is one this Court need not address. The decision below correctly states that a continuance is within the discretion of the trial court as long as that discretion is not abused. The state's argument that Rose v. Lundy requires the dismissal of a mixed petition is accurate, but inapplicable in this case since there has been no mixed petition filed.

THREE

The Court of Appeals has properly determined that the unexhausted claims of the Defendant should not be rejected as waived. That court, agreeing with the trial court, realized that the unexhausted claims the Defendant wished to pursue in state court could not have been raised sooner in any appropriate or responsible manner. The district and appellate courts have found that no procedural rule had been violated by the actions of the Defendant. Because of these factual determinations, this issue need not be addressed by this Court.

ARGUMENT

ONE

Before this Court can reach the question of whether a federal district court must accept the state's explicit waiver of the exhaustion of state remedies requirement, this Court must decide the underlying question of whether there can be a waiver of the exhaustion requirement. The question, whether a state may waive exhaustion is one that has split the circuits. The majority of circuits have held there can be no waiver of the exhaustion requirement even if requested by the state.

In Needel v. Scafati, 412 F.2d 761, 766 (1st Cir. 1969), that court stated, "The doctrine of exhaustion, however, based on a sensitive respect for the capacity of a coordinate judicial system, is not a matter for waiver by counsel." This point of law is followed in United States ex rel. Sostre v. Festa, 513 F.2d 1313, 1314 n.1 (2d Cir. 1975), stating, "We do not consider that the statutory requirement of exhaustion of state remedies can be waived by the state." The Third Circuit has repeatedly held that strict adherence to the exhaustion requirement is required:

> . . . the state court interest which underlies the exhaustion requirement of §2254(b) cannot be conceded or waived by state prosecutors - for the state court interest in having "an initial 'opportunity to pass upon and correct' alleged violations of its prisoners federal rights" is simply not an interest that state prosecutors have been empowered to yield. "Waiver", like "Concession," is not a talisman, the incantation of which will cause the exhaustion requirement to disappear. That requirement remains.

United States ex rel. Trantino v. Hatrack, 563 F.2 86, 96 (3d Cir. 1977). See also Zicarelli v. Gray, 543 F.2d 466 (3d Cir. 1976). This policy has been accepted and adopted by the Ninth Circuit in Jackson v. Cupp, 693 F.2d 867 (9th Cir. 1982), as well as by the Tenth Circuit, Naranjo v. Ricketts, 696 F.2d 83 (10th Cir. 1982).

A clear and concise exposition of the law against waiver is stated in Bowen v. State of Tennessee, 698 F.2d 41 (6th Cir. 1983), which considered exhaustion both before and after this Court's decision in Rose v. Lundy, 102 S.Ct. 1198 (1982). The panel decision in Bowen permitted a waiver of the total exhaustion requirements. The Sixth Circuit, en banc, after the decision in Rose v. Lundy, determined that:

> Wherefore, in light on (sic) the emphasis in Rose upon comity as protecting "the state court's role in the enforcement of federal law and prevent[ing] disruption of state judicial proceedings", 102 S.Ct. at 1203 (emphasis added) this court concludes that the total exhaustion rule promulgated in Rose may not be waived or conceded in the district court by a state attorney general and may be noticed by this Court sua sponte on appeal.

698 F.2d at 243.

It is clear that the majority of circuits hold that the state may not waive the total exhaustion requirement. The decisions cited by the state are limited to the Fourth, Fifth, and Eleventh Circuits. The decision below by the Eleventh Circuit attempts to balance the strict holding of no waiver of exhaustion with the opinions of the Fifth and Fourth Circuits which permitted waiver of exhaustion at the behest of the state. In the underlying opinion, the Eleventh Circuit held that the state may waive exhaustion but that this did not have to be accepted by the district court. The Eleventh Circuit has placed itself clearly in the middle of the two poles of the waiver question.

The decisions relied upon by the state do not clearly support its argument that the federal court must accept a state's waiver of the exhaustion requirement. Even in Jenkins v. Fitzberger, 440 F.2d 1188 (4th Cir. 1971), that court used the word may, showing there was still discretion with the district court about whether to accept a waiver.

> Since the exhaustion requirement of 28 U.S.C. §2254 "is not a jurisdictional concept, but simply a flexible matter of comity," Williams v. Coiner, 392 F.2d 210, 213 n.2 (4th Cir. 1968), we think that the federal courts may in the interest of justice and expedition accept waiver of exhaustion by the state.

Jenkins, supra at 1189 (emphasis added).

In Houston v. Estelle, 569 F.2d 372 (5th Cir. 1978), at page 375, the Fifth Circuit said, "Finally, since the exhaustion requirement is nonjurisdictional, it may be waived by the state, Collins v. Estelle, 474 F.2d 988, 989 (5th Cir. 1973), and we may give consideration to the expenditure of federal judicial resources below."

It is clear from the foregoing analysis of the case law and the demonstration of the split of authority that the question of waiver of exhaustion is one that can only be determined by this Court. This question needs resolution; jurisdiction in this case should be accepted so that a determination can be made enunciating a clear principle to be followed by the lower courts.

TWO

The state's reasoning on the question of whether a federal court can properly grant a continuance to permit a Defendant to raise unexhausted claims in state court is unsupported, as well as inapplicable in this case. The state, in its argument, relies heavily on Bowen v. State of Tennessee, 698 F.2d 241 (6th Cir. 1983) (en banc) and upon Duckworth v. Cowell, 455 U.S. 996 (1982), and Rodriquez v. Harris, 455 U.S. 997 (1982). The state's reliance upon these cases is inapposite and misplaced in this cause because those decisions relate to mixed habeas petitions that had been filed. In the instant case there have been two judicial determinations that there has not been a mixed petition filed. The trial court initially found that "The petition includes only exhausted claims." (A1). The Eleventh Circuit in its decision also held that the habeas petition contained only exhausted claims: "The Petitioner did not file a mixed petition seeking rulings on unexhausted claims." (A10).

The state's additional argument is that the order of the district court orders the state to do some act which the court is not empowered to order the state to do. This again is inapplicable as it does not relate to the facts below. The district court's order was not directed to the state, but was directed solely to the Defendant below: "Ordered and Adjudged, that the Petitioner's Application for a Continuance pending the prosecution of his unexhausted claims in the Florida Courts is granted." (A 4). The district court's order was not directed at the state, but was directed at the Defendant to enable him to proceed in the state courts, not directing the state courts to accept and/or rule upon his pleadings.

The question whether a district court has discretion in granting a continuance in a habeas corpus proceeding is one that has been settled in favor of permitting the trial court to exercise its discretion. This determination is grounded in sound judicial theory and is based upon the power granted to the court by Title 28, U.S.C. §2254 and the "All Writs Act," Title 28,

U.S.C. §1651. In Harris v. Nelson, 394 U.S. 286 (1969), this Court stated:

> Clearly, in these circumstances, the habeas corpus jurisdiction and the duty to exercise it being present, the courts may fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage. Where their duties require it, this is the inescapable obligation of the courts. Their authority is expressly confirmed in the All Writs Act, 28 U.S.C. §1651. This statute has served since its inclusion in substance, in the original Judiciary Act as "legisatively approved source of procedural instruments designed to achieve the "rational ends of law."

394 U.S. at 299.

The original order of the district court which grants a continuance in this cause, which was affirmed by the decision below, was well within the discretion of the court based upon its inherent authority to promulgate orders and regulations so that manifest justice could prevail. The question of continuance is not one which arises from conflicts within the circuits and is not one which this Court should consider in determining whether to accept jurisdiction in this cause.

THREE

The third question presented by the state is another which raises no substantial jurisdictional claim. The issue is moot by the state's concessions and the decision of the Eleventh Circuit below which stated:

> The short answer is that Thompson did not file his unexhausted claims in federal court, but rather seeks to get them ruled on in state court. The state raised an abuse of the writ argument, but declined to pursue it after noting that petitioner was making a good faith effort to avoid piecemeal litigation and to attain the desirable end of one single plenary federal proceeding.

(A 11). Thompson, 714 F.2d at p. 1500.

The unexhausted claims the state contends should be rejected as waived are claims that could not have been raised earlier in the proceedings. The district court in its order stated, "Under the circumstances recounted in the application for

continuance, it appears the petitioner could not have raised these grounds to challenge his conviction until there was a change of counsel." (A3). The Eleventh Circuit similarly addressed this issue:

> In its brief, the state contends that the motion should have been denied because petitioner failed to raise the issues in his first motion for collateral relief in state courts and because eventually, when presented to the federal court, the two new claims would be barred by Wainwright v. Sykes, 433 U.S. 72, (1977). At oral argument the state acknowledged that petitioner violated no state procedural rule by failing to raise the two new claims in his first motion for collateral relief and thus that Sykes would not be triggered.

(A 11).

The state now seeks to argue that the Defendant deliberately forfeited the issues raised in the unexhausted claims. As is shown by the order of the trial court, these are issues that could not have been raised by the Defendant in the earlier motion for collateral relief. The district court clearly found that Defendant had been unable to raise the new claims until he changed counsel. The claims of ineffective assistance of counsel cannot be filed by counsel against himself. This appears to be an obvious point that the state regularly seems to ignore. The state's contention is that the claims are the defendant's and that he should be required to raise them with or without counsel to advise him. All claims are the defendant's, but whether or not they can be raised and properly addressed to a court requires the assistance of counsel and said counsel's determination. The state contends this was entrusted to counsel and waived by counsel's choice. This is in contradiction to their contention that the claims are a defendant's and can be raised without counsel. If counsel can control the waiver of a defendant's claims, then, in effect, it would be unfair to expect a defendant to raise such claims without counsel, and to hold it against a defendant that those claims could not be raised until he received new and different counsel.

This issue raised by the state is not one requiring this Court to accept jurisdiction. There is no conflict within the circuits. The state's reliance upon Jordan v. Procunier, ___ F.Supp. ___(E.D.VA. 1983, 34 Crim.L.Rep. 2033), is not worth considering because that case is clearly distinguishable as a successive writ situation and the present cause is one where the claims were not raised in the habeas petition but were discussed in the continuance request. This Court should not address itself to this issue.

CONCLUSION

WHEREFORE, based upon the foregoing, this Court should accept jurisdiction of this cause only as to the first question presented.

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APPENDIX TO BRIEF OF RESPONDENT

ON JURISDICTION

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-365-Civ-JCP

WILLIAM LEE THOMPSON,)
Petitioner,)
v.)
LOUIE L. WAINWRIGHT,)
Respondent.)

AMENDED ORDER GRANTING PETITIONER'S APPLICATION for CONTINUANCE and PERMITTING an APPEAL UNDER RULE 5 of the FEDERAL RULES OF APPELLATE PROCEDURE.

On February 24, 1982 petitioner filed his petition for Writ of Habeas Corpus.

The petition includes only exhausted claims but petitioner has applied for a continuance of hearing on the merits of the petition until he has filed and fully prosecuted in the Florida courts his unexhausted claims. These unexhausted claims challenge the entry of the guilty plea as being involuntary and assert ineffective assistance of counsel. The respondent opposes this application.

Three options have been considered to resolve this situation. First, since the application for continuance was filed concurrently with the petition, the Court could construe this as being a mixed petition. Then the petition would have to be dismissed in accordance with Rose v. Lundy, 102 S.Ct. 1198 (1982).

The second option is also a corollary of the holding in Rose. If the application for continuance is denied proceedings would continue until a decision was reached on the exhausted claims. Alternatively, if the petition was dismissed as containing exhausted and unexhausted claims, the petitioner, under Rose, has the choice of returning to State Court to exhaust his

claims or of amending the petition to present only exhausted claims. Should petitioner proceed in this court with his exhausted claims, it is conceivable that he will return with a second petition when he subsequently exhausts his now unexhausted claims. Since that would result in an attack on first his sentence and later an attack on his conviction, that option appears unsatisfactory. But the rejection of that option at this time should not be construed as a finding that the petitioner could file a subsequent petition without risking dismissal under Rule 9 of the rules governing Section 2254 cases.

The third option is to grant the application for a continuance of the hearing on the merits. This seems most consistent with the underlying policies of the exhaustion requirement when applied to a death penalty challenge. It will accomplish the same result as the first option.

The exhaustion requirement is a judicial doctrine, now codified, to further the notions of comity that arise in a dual system of government. "...(f)ederal District Courts ought to dismiss mixed petitions so that petitioners will exhause all their constitutional claims prior to Federal Court intervention. Considerations of comity, avoidance of piecemeal litigation, economy of judicial energy and the fullest consideration of a petitioner's claims are best served if all of a petitioner's claims are presented to the State Court system at one time... The goal is to have a petitioner travel through each system only once, at most, in quest for vindication of alleged constitutional errors." Galtieri v. Wainwright, 582 F.2d 348 (5th Cir. en banc 1978) at p.356. "Consequently, one federal proceeding embracing all claims can be attained only by requiring a petitioner to submit all of his claims to the State Courts before he seeks federal habeas corpus relief." Galtieri at p.357.

A-2

While continuing the federal petition allows Mr. Thompson to proceed through the state system a second time, it is preferable to have partial fulfillment of the goal than none at all. Under the circumstances recounted in the application for continuance, it appears that petitioner could not have raised these grounds to challenge his conviction until there was a change of counsel. Unless the petitioner is granted relief by the Florida Courts, the outcome of the procedure will more than likely be the same as if the petition was dismissed in accordance with the first option. Either way the petitioner may exhaust his claims in State Court. Thereafter all of the petitioner's claims can be dealt with at one time.

It is recognized that the third option is more beneficial to the challenge of a death sentence than when the underlying conviction is at issue. It is of advantage to the death row inmate to indefinitely continue a federal habeas petition while time is spent litigating unexhausted claims. The continuance in itself is a partial victory by maintaining the status quo of imprisonment.

The concerns of Justices Blackman, White and Stevens in Rose v. Lundy are not as relevant when the challenge is to the death penalty as opposed to a sentence of confinement. When liberty is in question, the habeas petitioner has an incentive for the Federal Court to hear its most meritorious constitutional claim as quickly as possible. The total exhaustion requirement can thwart both the petitioner's and society's interest in swiftly redressing unconstitutional confinements. But where the death penalty is involved any delay can only work to the petitioner's advantage. While it is more difficult to measure the impact on societal interest, there is no doubt that such delays result in inciting a hue and cry from the public.

The Court is reluctant to institute any unnecessary delay in this process and is sympathetic with the public's negative perceptions of such delay. But on the face of the record before the Court, which at this time contains the petition, application for continuance and the response to the application, it is perceived that the petitioner is making a good faith effort to litigate the entirety of its substantial constitutional claims in one federal proceeding. More than likely, the time utilized at this juncture to determine whether there has been an abuse of the writ would not be prudently spent.

However as reflected in the foregoing analysis, the present issue involves a substantial and controlling issue of law as to which there is substantial ground for difference of opinion. An immediate appeal from the present order may materially advance the ultimate termination of the litigation. It is therefo

ORDERED and ADJUDGED, that the Petitioner's application for a continuance pending the prosecution of his unexhausted claims in the Florida Courts is granted. It is further,

ORDERED and ADJUDGED, that within the meaning of Rule 5 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 1292(b) the Respondent is granted permission to seek immediate review of the present order.

DONE and ORDERED in Miami, Dade County, Florida this 7th day of June, 1982.

James C. Paine
UNITED STATES DISTRICT JUDGE

cc Proposed Copy: Michael VanZampt

cc: Michael VanZampt
Calvin Fox

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PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 82-6052

WILLIAM LEE THOMPSON,

Petitioner-Appellee,

versus

LOUIE L. WAINWRIGHT,

Respondent-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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(September 6, 1983)

Before GODBOLD, Chief Judge, KRAVITCH, Circuit Judge, and MORGAN, Senior Circuit Judge.

GODBOLD, Chief Judge:

In this habeas corpus case brought by a Florida state prisoner under sentence of death we decide three issues. We hold that a district court having before it a habeas petition containing only exhausted claims may continue the case at the petitioner's request pending his presenting to the state courts other claims that are not included in the petition and have not been exhausted. We hold that the state of Florida through its attorney general may waive the requirement of 28 U.S.C. Sec. 2254 that a petitioner seeking federal habeas corpus must first exhaust state remedies. And we hold that the district court, in its discretion, may accept or reject the state's waiver.

Based on his guilty plea, petitioner Thompson was convicted in Florida court of first degree murder, kidnapping and sexual battery. As recommended by the sentencing jury, the trial judge imposed the death sentence. The Florida Supreme Court affirmed Thompson's conviction and sentence on direct appeal, placing special emphasis on the extreme brutality of the crime. Thompson v. State, 389 So.2d 197, 200 (Fla. 1980). The sentencing court summarily denied Thompson's subsequent motion for collateral relief under Fla. R. Crim. P. 3.850 (West Supp. 1983), and the Florida Supreme Court affirmed. Thompson v. State, 410 So.2d 500 (Fla. 1982). Throughout all these state proceedings Thompson was represented by his trial counsel.[1]

---

[1] This is the chronology of Thompson's cases:
March 1976 offense committed;

Only days before his scheduled execution Thompson secured new counsel. The new attorney filed a petition for habeas corpus in federal district court, and that court granted a stay of execution. The petition raised numerous constitutional allegations previously addressed to the state courts. Contemporaneously Thompson's attorney filed a motion for continuance, (a postponement of any further proceedings), setting out that there were two grounds for post-conviction relief that were not alleged in the habeas petition (entry of an involuntary and unintelligent guilty plea and ineffective assistance of counsel); that these grounds had not been raised earlier because petitioner had been represented throughout previous proceedings by trial counsel; and that these issues needed to be raised in the first instance in state post-conviction proceedings.

Sept. 1978:	conviction and sentence;
Nov. 1980:	affirmed by Florida Supreme Court;
July 1981:	motion to vacate filed, state trial court;
Aug. 1981:	motion denied without hearing;
Jan. 12, 1982:	commutation hearing before governor of Florida;
Feb. 5, 1982:	death warrant signed for execution on March 2, 1982;
Feb. 11, 1982:	denial of motion to vacate affirmed, Florida Supreme Court;
Feb. 24, 1982:	petition for habeas corpus and motion to continue hearing, filed federal district court;
Feb. 25, 1982:	stay of execution granted, federal district court;
April 1982	federal district court order granting continuance;
Oct. 1982	permission to appeal granted by this court, appeal expedited.

The respondent, secretary of the Florida Department of Corrections (hereinafter "the state"), represented by the Florida attorney general, opposed the motion for continuance on the ground of deliberate bypass, see Fay v. Noia, 372 U.S. 391, 439 (1963), and abuse of the writ, see Rules 9(a) and (b) of Rules Governing Sec. 2254 Cases in U.S. District Courts; Sanders v. U.S., 373 U.S. 1, 15-23 (1963).

The court conducted a hearing. The attorney general notified the court that the state waived exhaustion of the two unexhausted claims.[2]

The court granted the continuance on the ground that this was the action most consistent with the underlying policies of the exhaustion requirement as applied to a death penalty challenge. The court noted that Thompson had been unable to raise the two new claims until he changed counsel and that he appeared to be making a good faith effort to litigate all of his constitutional claims in one federal case. The court did not give effect to, or even refer to, the state's waiver.

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[2] Petitioner contends that the attorney general did not timely tell the court that the state waived exhaustion. If this has any legal significance, it is laid to rest by an order later entered by the district court granting a stay pending appeal. In this order the court recites that the state has waived exhaustion, and refers to an affidavit by the attorney general that placed notice to the court of waiver as having been given before the order granting a continuance was entered. This is a sufficient finding, express or implied, that the court was timely notified that the attorney general waived exhaustion.

The court certified the case for interlocutory appeal under 28 U.S.C. Sec. 1292(b) and at the request of the state stayed its order pending appeal. We granted leave to appeal.

Before this court the state continues to assert on bypass and abuse of the writ grounds that the court should not have postponed further action on the federal petition. Its main point is, however, that the court erred in not giving effect to the state's waiver of exhaustion.[3] Citing its interest in prompt final determination of the validity of convictions and sentences rendered in its courts, the state says that as a matter of policy it wishes to have available to it the discretion to explicitly waive exhaustion in habeas cases. Moreover, the state contends that once such a waiver is asserted the federal district court is bound to accept it. These two prongs of the waiver of exhaustion issue go to the heart of the two-tier state-federal system of review of the constitutionality of state criminal convictions and sentences. They implicate the principles of comity and of federalism that underly the two-tier review. And they involve the search for finality in criminal cases.

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[3] The two unexhausted state claims are not included in the federal petition. However, petitioner has triggered federal jurisdiction and has expressed his desire to have all constitutional issues settled in the one federal proceeding. Should the court accept the state's waiver, it can marshal the issues and require petitioner to amend to bring in the non-exhausted claims, thereby affording both state and petitioner the single plenary adjudication that both seek.

I. The power of the court to delay the federal proceedings

The state's contention that the district court had no power to grant a continuance of the habeas petition pending before it, or abused its discretion in doing so, is patently without merit. The court has the power to control its docket. So long as it abides by the limits of discretion, it can leave a habeas petition dormant on its docket while the petitioner presents to the state court unexhausted claims.

The express aim of the district court, set out in its carefully phrased order, was to enable all constitutional claims to be settled in one federal habeas proceeding. Rose v. Lundy, 455 U.S. 509 (1982), does not forbid the continuance. The petitioner did not file a mixed petition seeking rulings on unexhausted claims. To the contrary, he asked that ruling on his exhausted claims be withheld until unexhausted claims could be presented to the state court and then all claims, properly exhausted, considered in the federal court at one time. This furthers the interests underlying Rose rather than impedes them.

The district court could have denied a delay, decided the issues that were alleged in the petition, and left Thompson to the risks of a second federal petition on the two new claims. But no rule or policy required it to do so.

The state's objections to the continuance order are dubious. It argues that under Fay v. Noia Thompson deliberately bypassed state courts by "filing" his unexhausted claims in federal court instead of state court. The short answer is that Thompson did not file his unexhausted claims in federal court but rather seeks to get them ruled on in state court. The state raised an abuse of the writ argument, but declined to pursue it after noting that petitioner was making a good faith effort to avoid piecemeal litigation and to attain the desirable end of one single, plenary federal proceeding.

In its brief the state contends that the motion should have been denied because petitioner failed to raise the issues in his first motion for collateral relief in state courts and because eventually, when presented to the federal court, the two new claims would be barred by Wainwright v. Sykes, 433 U.S. 72 (1977). At oral argument the state acknowledged that petitioner violated no state procedural rule by failing to raise the two new claims in his first motion for collateral relief and thus that Sykes would not be triggered.

The district court did not err in granting the continuance.

II. The power of the state to waive.

(A) Authority of the attorney general under state law.

Under the Florida constitution, Article 4, Sec. 4, the attorney general is a member of the cabinet and is "the chief state legal officer" of the executive department. By statute, Fla. St. Ann. Sec. 16.01(2) (West Supp. 1982), he must perform "such other duties appropriate to his office as may from time to time be required of him by law or by resolution of the Legislature." His responsibilities with respect to litigation are covered in subsections (4) and (5) of Sec. 16.01. The attorney general:

> (4) Shall appear in and attend to, in behalf of the state, all suits or prosecutions, civil or criminal or in equity, in which the state may be a party, or in anywise interested, in the Supreme Court and district courts of appeal of this state.
>
> (5) Shall appear in and attend to such suits or prosecutions in any other of the courts of this state or in any courts of any other state or of the United States.

It is obvious that the "such suits" in (5) are those described in (4), "all suits or prosecutions, civil or criminal or in equity, in which the state may be a party, or in anywise interested." The statutory mandate to the attorney general is not merely to appear but to "attend to, in behalf of the state, all suits or prosecutions," etc.

By Florida judicial decisions, the grant of specific state powers to the attorney general does not deprive him of the powers belonging to him under the common law, which include prosecuting "all actions necessary for the protection and defense of the property and revenue of the state. . . ." State ex rel. Landis v S. H. Kress & Co., 155 So. 823, 827 (Fla. 1934). Also, "it is his duty, in the absence of express legislative restrictions to the contrary, to exercise all such power and authority as public interests may require from time to time." Id. Moreover, in Florida the office of attorney general is in many respects judicial in character, and he is clothed with considerable discretion. Id. at 828.

The attorney general's authority runs beyond responsibility to the government qua government. He is responsible to the people. "The Attorney-General is the attorney and legal guardian of the people, or of the crown, according to the form of government." State ex rel. Davis v. Love, 126 So. 374, 376 (Fla. 1930). When occasion arises "it is his duty to use means most effectual to the enforcement of the laws, and the protection of the people." Id. "The Attorney General is the principal law officer of the state." Id. at 377.

We conclude that under these powers granted by Florida common law, statutes and case law, the state's attorney general had the authority to expressly waive exhaustion of state remedies

so that all claims could be presented and decided in one federal proceeding. Florida law gives the attorney general authority to waive exhaustion whether exhaustion, as we hold, promotes the interests of the state as sovereign or, as some other courts have held, promotes only the interests of state courts. See note 11 and accompanying text infra. We hold that, so far as state law is concerned, the attorney general had authority to speak for the interests of state courts and judges as well as the other instrumentalities of Florida state sovereignty. We believe that if the Florida courts were presented with these same questions they would reach the same conclusions.

(B) Power of the state to waive - federal law

This brings us to consideration of whether principles of federal law will deny effect to the state's waiver exercised through its attorney general as authorized officer. This requires us to examine the principles of comity and federalism that underlie the two-tier system of collateral review and the exhaustion requirement that has been carried forward into 28 U.S.C. Sec. 2254 (b)-(c) (1976).

(1) The prior history of state waiver of exhaustion

In a long line of cases this circuit, the former Fifth, and the new Fifth have held that in the district court a state, through its attorney general, by express act or by failure to

raise the issue, can waive petitioner's failure to exhaust. Westbrook v. Zant, 704 F.2d 1487, 1492-94 (11th Cir. 1983) (concession in answer that recourse to state courts would be futile); Shaw v. Boney, 695 F.2d 528, 529 n.1 (11th Cir. 1983) (failure to raise); Lamb v. Jernigan, 683 F.2d 1332, 1335 n.1 (11th Cir. 1982) (concession in answer that resort to state courts would be futile); Felder v. Estelle, 693 F.2d 549 (5th Cir. 1982) (express waiver); Houston v. Estelle, 569 F.2d 372, 375-76 (5th Cir. 1978) (statement in answer: "Respondent does not contend that Petitioner has failed to exhaust his state remedies."); Hopkins v. Jarvis, 648 F.2d 981, 983 n.2 (5th Cir. 1981) (Unit B) (exhaustion raised in answer, magistrate held petitioner had exhausted, issues not raised before district court on review of magistrate's report and recommendations; held waived); Messelt v. Alabama, 595 F.2d 247, 249-51 (5th Cir. 1979) (failure to raise); West v. Louisiana, 478 F.2d 1026, 1034-35 (5th Cir. 1973) (failure to raise), aff'd in pertinent part, 510 F.2d 363 (5th Cir. 1975) (en banc). The court of appeals may treat the waiver before the district court as effective and consider the unexhausted claims even though on appeal the state argues non-exhaustion. Messelt v. Alabama; West v. Louisiana. See generally, Comment, State Waiver and Forfeiture of the Exhaustion Requirement in Habeas Corpus Actions, 50 U. Chi. L. Rev. 354 (1983).

A number of the foregoing cases involve "futility of exhaustion," where there is ineffective state process or an absence of available state process. These are exceptions to exhaustion that have been codified in Sec. 2254(b). It is obvious that when futility is contested there is no waiver of exhaustion. But when the state affirmatively acknowledges futility, or expresses uncertainty, its statement is often considered under the rubric of waiver and accepted without analysis of whether the acknowledgement is substantively correct. Similarly, the state may be asked to take a position on futility and may not respond, and its silence then may be treated as waiver.

At the appellate level we have treated as a waiver the state's failure to raise exhaustion on appeal, Shaw v. Boney (failure to raise in district court and on appeal); Lamb v. Jernigan (same), and its concession that resort to state courts would be futile. Warren v. Conner, 365 F.2d 590, 591 (5th Cir. 1966) (vigorous assertion of failure to exhaust; supplemental statement recognizing uncertainty of state remedies accepted as waiver); Tolg v. Grimes, 355 F.2d 92, 95, 97-98 (5th Cir. 1966) (non-exhaustion argued in district court but concession on appeal that recourse to state courts would be futile). Recently

we have accepted an express waiver of exhaustion addressed to the court of appeals. Corn v. Zant, ___ F.2d ___ (11th Cir. 1983); Westbrook v. Zant.

In Felder v. Estelle, a post-Rose v. Lundy decision, the Fifth Circuit held that the district court erred in holding that the Texas attorney general could not, on behalf of the state, expressly waive failure to exhaust in a mixed petition case.[4]

Felder recognizes that some cases concern "waiver by negligence" or inaction while in others the waiver is express. 693 F.2d at 554 n.4. Some of the "waiver by inaction" cases are bottomed on what might be called a strict pleading approach. Resorting to principles of estoppel applied generally to other litigants and defenses, the court concludes that the state has waived exhaustion by failing to raise the issue, either in district court or on appeal.[5] Although we prefer to rest our

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[4] Felder remanded to the district court with instructions to accept the waiver and reach the merits. We leave it in the discretion of the district court whether to accept the waiver. See Parts III and IV, infra. Compare Sweet v. Culp, 640 F.2d 233 (9th Cir. 1981), discussed infra.

[5] Judge Merritt, dissenting in Bowen v. Tennessee, ___ F.2d ___, ___ (6th Cir. 1983) (en banc), has set out the reasoning that underlies this approach:

> Rule 5 of the rules governing habeas corpus cases in the District Court adopted by the Supreme Court on April 26, 1976, 28 U.S.C. Sec. 2254, requires the defendant to set out in its answer its position respecting exhaustion of state remedies. Rule 11 of those rules makes the Federal Rules of Civil Procedure applicable. Rule 12(h), Fed. R. Civ. P., provides that the failure to raise a defense other than subject

decision on the broader ground that the nature of comity, as incorporated by Sec. 2254 exhaustion, permits the state attorney general to waive exhaustion expressly on behalf of the state, see Part II, B, (2) infra, the strict pleading cases provide useful guidance. These cases imply the validity of two important conclusions. First, exhaustion is not an inflexible rule of subject matter jurisdiction that the court must raise sua sponte but is rather subject to waiver and estoppel. Second, the state attorney general may waive exhaustion on behalf of the state.

As Felder points out, 693 F.2d at 554 n.4, to treat express waivers differently from waivers by inaction "would only lead to illogical and unmanageable results." It would make no sense, and indeed invite deviousness and uncertainty, to hold that an attorney general cannot do advisedly what he can do accidentally. Moreover, we have described a third type of case, closely related to an express waiver, where the attorney general, in discharge of his duty as an officer of the court, expresses uncertainty over whether adequate state remedies are available or points out that resort to state courts may be futile, and his expressions are accepted as a waiver of exhaustion. Westbrook v. Zant; Lamb v. Jernigan; Tolq v. Goins; Warren v. Conner.

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matter jurisdiction shall constitute a waiver of the defense. The defendant by failing to raise the point below has waived its claim that a mixed petition should be dismissed.

In Westbook v. Zant, for example, the state's answer declared that recourse to state courts on petitioner's unexhausted claims would be futile and went on to address the merits of the unexhausted claims. Further, the state did not mention non-exhaustion in objecting to the district court's ruling on the merits of petitioner's unexhausted claims. Citing Galtieri v. Wainwright, 582 F.2d 348, 356 n.15 (5th Cir. 1978) (en banc), the court held that once a district court has reached the merits of an unexhausted claim and appeal is taken, the appellate court must also entertain the merits. 704 F.2d at 1494.

But the court did not rely on Galtieri alone. It mentioned that on appeal, at oral argument, the state expressly waived exhaustion. Noting the state's consistent position on exhaustion at both the district court and appellate levels, the court stated: "[The state] obviously seeks resolution [of the unexhausted claims] on the merits." Id. In accepting the waiver made by the attorney general on behalf of the state, the court did not rely on a pleading approach. Rather, it focused on the considerations of comity that lie at the heart of Sec. 2254 exhaustion. After concluding that Rose v. Lundy did not preclude the state from waiving exhaustion, the court stated:

> In our view, holding that a state may waive exhaustion does not run contrary to the policy considerations of federal-state comity

> underlying total exhaustion of all constitutional claims initially in the state courts.

704 F.2d at 1494. Because Westbrook rests in part on the nature of comity and exhaustion, it lends broad and explicit support to the two conclusions that (1) exhaustion is waivable (2) by the state attorney general.

Finally, Supreme Court cases in areas analogous to habeas exhaustion reinforce the two conclusions mentioned above. The federal habeas rule relating to procedural defaults occurring in state court, see Wainwright v. Sykes, 433 U.S. 72 (1977), provides one analogous situation. Even though the Sykes rule is, like exhaustion, founded in part on considerations of comity, the Supreme Court has refused to consider the Sykes issue because the state, through its attorney general, has failed to raise it. See Estelle v. Smith, 451 U.S. 454, 468 n.12 (1981); Jenkins v. Anderson, 447 U.S. 231, 234 n.1 (1980).

Younger abstention furnishes another useful analogy. In Younger v. Harris, 401 U.S. 37 (1971), the Court held that except in extraordinary circumstances a federal court must abstain from deciding issues implicated in an ongoing criminal proceeding in state court. The Younger doctrine was subsequently broadened to preclude federal court interference with some types of ongoing civil proceedings in state courts. See, e.g., Hoffman v. Pursue, Ltd, 420 U.S. 592 (1975). In Ohio Bureau of Employment Services

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Like Westbrook, Hodory holds that comity does not categorically prohibit a state from deliberately waiving a rule designed in part to promote state interests.

(2) The nature of exhaustion and comity.

Exhaustion of state remedies is not a concept of subject matter jurisdiction but rather of federalism and comity, intended to give the state the initial opportunity to decide alleged violations of federal constitutional rights. Hopkins, 648 F.2d at 983 n.2; Felder, 693 F.2d at 552; Houston, 569 F.2d at 375; Westbrook, 704 F.2d at 1494 n. 8; Darr v. Burford, 339 U.S. 200, 204 (1950); Fay v. Noia, ___U.S. at ___, 83 S.Ct. at 839 (1963) ("The rule of exhaustion is not one defining power but one which relates to the appropriate exercise of power.") (quoting Bowen v. Johnson, 306 U.S. 19 (1939)). 17 Wright, Miller & Cooper, Federal Practice and Procedure, Sec. 4264 (1978). The question is not of federal power but equitable discretion. Houston.

Judge Thornberry, for the Fifth Circuit, in Felder v. Estelle, and Judge Higginbotham, concurring in the same decision, and Judge Gibbons in his dissenting opinion in U.S. ex rel. Trantino v. Hatrack, 563 F.2d 86, 98, 102-04 (3d Cir. 1977), cert. denied, 435 U.S. 928 (1978), have discussed at length comity as a general principle, and what they have said need not be repeated in full. The doctrine arose in international law where it concerned relationships between independent sovereigns.

Bank of Augusta v. Earle, 10 L.E. 274 (1839); Felder, 693 F.2d at 1161; Trantino, 563 F.2d at 193, (Gibbons, J., dissenting). Comity concerns the recognition that one sovereign extends to the legislative, executive and judicial acts of another. Hilton v. Guyot, 159 U.S. 113, 163-64 (1895). As between nations, "[i]t is not the comity of the courts, but the comity of the nation . . ." Bank of Augusta, supra at 308. The doctrine applies to "proper relations between sovereign states, rather than between judicial systems." Felder, 693 F.2d at 554.

Historically, in the 1960's after Fay v. Noia, federal courts urged states to create adequate first-tier collateral review if they lacked it, on the basis that the states were entitled, and often better able, to have the initial opportunity to review their own cases for constitutional error. The states responded, some by legislative acts, some by decisions. On the federal side, if collateral relief was denied in state court it was easier for the federal court to conduct its second-tier review having before it the prior state collateral decision and record. Nothing has happened in the 20 years since that commands a state to go through the first tier of review in a particular case even though, as Judge Gibbons puts it in his dissent in Trantino, it is "perfectly willing to have [the] case decided in

v. Hodory, 431 U.S. 471, 479 (1977), the state attorney general, appearing on behalf of the state raised Younger abstention before the district court but abandoned the issue before the Supreme Court, "at oral argument . . . resisting the suggestion of [abstention] . . . ." 431 U.S. at 479. The Court noted that although the named appellant was the Ohio Bureau of Employment Services, the appellant in effect was the State of Ohio. 431 U.S. at 477. Even though Younger abstention is, like Sec. 2254 exhaustion, a comity-based doctrine that arguably springs from deference to state courts, the Court accepted the state attorney general's decision, made on behalf of the state, to submit voluntarily to federal proceedings. It stated:

> It may not be argued, however, that a federal court is compelled to abstain in every such situation. If the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's system. In the present case, Ohio either believes that the district court was correct [in concluding that abstention was inapplicable] or, faced with the prospect of lengthy administrative appeals followed by equally protracted state judicial proceedings, now has concluded to submit the constitutional issue to this Court for immediate resolution. In either event, under these circumstances Younger principles of equity and comity do not require this Court to refuse Ohio the immediate adjudication it seeks.

431 U.S. at 480.

a federal forum now, for the obvious common sense reason that it must ultimately be resolved in a federal forum in any event." 563 F.2d at 101.

The nature of comity between national and state sovereignties in our federal system, as applied to the exhaustion doctrine in two-tier collateral review, necessarily implies power of the state to waive its right of initial review. Federal support of initial review in the state courts is not primarily to vindicate federal interests but in large measure arises out of deference to state interests. Trantino, 563 F.2d at 95. It is designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings. Rose v. Lundy, 71 L.Ed.2d at 387. Exhaustion is intended to give the state the opportunity for initial review. In particular cases the state may decide that its role is better performed, and its judicial proceedings disrupted less, by foregoing the opportunity of initial review. This is especially true where the state system already has performed elaborate initial review for the state petitioner -- as it has for Thompson -- and would be required to crank up its system again to examine his newest claims. The state might wish to invoke the abuse of the writ doctrine, but its judicial system would have to exercise its collateral review jurisdiction in order to consider application of the doctrine. Moreover, findings of abuse of the writ are

themselves difficult to sustain because of liberality toward pro se pleaders, changes in counsel, and the instinctive reaction of courts that a petitioner ought to be given a merits ruling on a constitutional issue. Additionally, a state denial of relief based on abuse of the writ grounds is antithetical to finality simply because it is not on the merits; a federal court may find it erroneous and, in a renewal of the ping pong game, hold that the state court must initially review the merits.

The state, then, must be allowed to assert that it wishes to forego the opportunity for initial review in those instances where initial review operates to its disadvantage. It is entitled to decide that this best vindicates its interests. (We discuss in Part IV our conclusion that the court is not required to accept the state's tender of waiver.) There is an element of Big Brotherism for a federal court to say, with respect to a principle that protects state institutions and values, that as a matter of federal law the state does not have the power to assert a desire to eschew application of the principle when it operates to its injury. This stands comity on its head and promotes state-federal disharmony. This is not to say that the contour and scope of the comity that exhaustion involves are not federally defined, but rather that a definition which ineluctably bars state waiver is wrong.

Both Felder and Westbrook hold that Rose v. Lundy does not preclude state waiver of exhaustion. Felder, 693 F.2d at 554 (Rose did not "address or even contemplate" the issue of state waiver). Westbrook, 704 F.2d at 1493 ("Rose v Lundy provides no instruction for the situation where the state fails to raise the lack of exhaustion."). We agree.

In adopting a total exhaustion rule the Court in Rose spoke of the desirability of giving state courts the opportunity to first pass upon and correct a constitutional violation. The Court stressed the importance of "minimizing friction between our federal and state systems of justice" by allowing the state "an initial opportunity" to act. There is no suggestion that the state's interest cannot be vindicated by passing up the opportunity when it elects to do so or that the extension of the opportunity is in fact an irrevocable mandate that the state court must act first.

Our decision is not limited to habeas cases where the death penalty has been imposed. But the death penalty cases starkly demonstrate the desirability of permitting state waiver of exhaustion. In at least some death penalty cases, construing Rose to forbid waiver will frustrate the goal of that decision, which is the avoidance of piecemeal litigation by encouraging habeas petitioners to exhaust all claims in state court and

present the federal court with a single habeas petition.[6] One of the premises of Rose is that the habeas petitioner desires speedy federal relief on his claim and that requiring plenary state court exhaustion, as a prerequisite to a federal determination, will advance him toward that end. This premise fits the petitioner in confinement under a sentence for years, whose purpose is to gain release from confinement. It does not necessarily fit the prisoner under death sentence whose purpose may be to stay alive.[7] He may desire to delay a final federal ruling by raising

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[6] The Eleventh Circuit has a particularly strong interest in the proper handling of death penalty habeas cases, to assure that the Constitution of the United States has been complied with in the arrest, trial, conviction and sentence of the prisoner and at the same time to assure that institutional and public interests in finality of decision are given correct weight. The number of prisoners under death sentence in the United States is approximately 1,100 to 1,200. Approximately one-third of these are in the three states of the Eleventh Circuit.

[7] The Supreme Court this term, in a somewhat different context, recognized the possibility that a death row inmate may attempt to use federal habeas review as a vehicle to delay implementation of his sentence. In Barefoot v. Estelle, 51 U.S.L.W. 5189-5191 (1983) (quoting Lambert v. Barnett, 159 U.S. 660, 662 (1895)), the Court stated: "'It is natural that counsel for the condemned in a capital case should lay hold of every ground which, in their judgment, might tend to the advantage of their client . . . .'" The Court also discussed procedures that may be used to minimize potential delays. Because, "unlike a term of years, a death sentence cannot be carried out by the state while" federal appellate review is pending and because "federal habeas [is not] a means by which a defendant is entitled to delay an execution indefinitely," id., the Court admonished federal courts to identify cases "where constitutional error requires retrial or resentencing as certainly and swiftly as orderly procedures will permit." 51 U.S.L.W. at 5192. Barefoot holds that appellate courts may adopt expedited procedures in resolving the merits of habeas appeals.

in succession a series of unexhausted claims. Until the final, ultimate federal determination his sentence may not be carried out because state and federal courts may have to enter stay orders until they can examine the merits of his claims. See Barefoot v. Estelle, 51 U.S.L.W. 5189 (1983). Sending such a petitioner back to the state system to exhaust a new claim gives him a reprieve from finality.[8] Each delay, for its span, is a commutation of a death sentence to one of imprisonment.[9] By waiving exhaustion the state can seek to move the case toward the

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[8] Judge Brown of the Fifth Circuit has aptly described the tension between exhaustion and finality in habeas cases:

> New restrictive rules emerge, nearly all of which are designed to require that the case must have been fully exhausted in the state tribunals as a condition for federal court review. Commendable as those so-called technical rules are in reducing opportunities for abuse of the Great Writ, each has within itself further complications including repeated appeals.

Brown, Is There an End in Sight in the Captain's Spyglass? The Quest for Finality, forthcoming in 48 Air Law & Commerce __ (1983).

[9] A congressional committee examining the federal habeas corpus statute has expressed concern over the delays associated with federal habeas review in death cases.

> Another disconcerting situation to which the Conference Committee on Habeas Corpus originally addressed itself was the delays in executing State court sentences in capital cases as a result of habeas corpus applications seeking review of State court action . . . .

H. Rep. No. 1892, 89th Cong., 2d Sess. 5 (1966).

ultimate federal decision. By accepting or declining the waiver, see Part III infra, the federal court can limit waiver to appropriate cases and issues.[10] No invasion of state interests is involved but rather an acceptance by the state that its interests will be suitably vindicated in the federal proceeding. In short, Rose is a tool that protects state and federal interests. It is not a trap for both sovereigns.

The best known case that views comity in our state-federal system differently than we do is Trantino, which holds that exhaustion as an instrument of comity serves interests not of state prosecutors but of state courts and therefore may not be waived by the attorney general of New Jersey. 563 F.2d at 96. Naranjo v. Ricketts, ___ F.2d ___ (10th Cir. 1982) and Bowen v. Tennessee, ___ F.2d ___ (6th Cir. 1983) (en banc) adopt this same rationale. See also Sweet v. Cupp, 640 F.2d 233, 237 n.5 (9th Cir. 1981); Needel v. Scafati 412 F.2d 761, 766 (1st Cir. 1969).

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[10] While the district judge in this case was addressing the matter of continuance rather than of exhaustion, in his thoughtful and carefully drawn order he considered Rose v. Lundy and Galtieri v. Wainwright, 582 F.2d 348 (5th Cir. 1978) (en banc), as applied to the unique characteristics of a death penalty case. He chose the option of a continuance while petitioner exhausts the two new claims, because, he found, it was most consistent with the underlying policies of the exhaustion requirement when applied to a death penalty challenge. Permitting waiver of exhaustion furthers the same considerations though in a different manner.

With deference, it seems to us that describing the issue as a choice between the interests of a state prosecutor and interests of state courts asks the wrong question. Rather we believe that the question is more precisely put in two parts: does exhaustion serve the interests of the state and its sovereignty or of only state courts and judges? And, whoever the beneficiary of the state's interests, is the state attorney general authorized to waive for that beneficiary?

With respect to the first question, just as Judge Gibbons, dissenting in Trantino, we have difficulty identifying the doctrinal basis for the conclusion that comity in a habeas case means not comity between sovereigns but a different and narrower comity limited to courts and judges.[11] Of course, the state courts' first opportunity to review is a concept that has originated with one judicial system,[12] the federal, and has impacted on

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[11] In Rose the Supreme Court did describe the role of exhaustion as "to protect the state courts' role in the enforcement of federal law and present disruption of state judicial proceedings." 71 L.Ed.2d at 387. The Sixth Circuit gave particular weight to this language in Bowen v. Tennessee, supra. We believe that this reference to the purpose of exhaustion does not represent the Court's considered judgment that in the context of Sec. 2254 exhaustion comity is limited to the relationship between the judicial branches of state and federal governments.

Even if we were to read the language in Rose literally, it is entirely consistent with our holding that Florida's attorney general is authorized by Florida law to waive the interests of state courts and judges.

[12] The habeas exhaustion requirement originated in judicial decisions. Sec. 2254 was intended simply to codify "existing law as affirmed by the Supreme Court" in Ex parte Hawk, 321 U.S. 114, 117 (1944). H. Rep. No. 308, 80th Cong., 1st Sess., A180

another judicial system, the state's. But the identity of governmental actors extending and receiving deference is not the measure of sovereignty or of comity between sovereigns. First opportunity to review is extended to judges in New Jersey not merely because they are judges but because they are judges of the state of New Jersey. The interests are those of the state though executed by judges. Comity, as reflected in Sec. 2254, undoubtedly promotes the interests of state courts, but this is merely one aspect of comity's broader purpose of maximizing the control that a sovereign state has over its criminal justice system. See Sandalow, Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine, 1965 Sup. Ct. Rev. 187, 213-14; Brennan, Some Aspects of Federalism, 39 N.Y.U. L.Rev. 945, 957-58 (1964); Meador, Accommodating State Criminal Procedure and Federal Postconviction Review, 50 A.B.A. J. 928, 929 (1964).

There are many identifiable and important state interests implicated in the interplay of the two-tier collateral relief system that reach far beyond the interests of state courts and judges. In the present case the attorney general, as Florida's chief legal officer, is interested in the prompt and affective administration of the state's criminal laws and in finality as a

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(1947) (Reviser's Notes). See Rose v. Lundy, 71 L.Ed.2d 379, 385-386 & n.8 (1982).

part thereof. The governor has a like interest, particularly in death penalty cases where he has a direct, individual responsibility in the process. The two-tier system of review affects legislative funding for prisons. It inevitably affects the executive department's administration of Florida's penal system. The respondent in this case is the superintendent of the State Department of Corrections. The attorney general, who must represent the state in its appellate courts and in federal courts, must supply resources -- lawyers and staff support -- in both systems. The state bears part of the financial burden of fees to public defenders and appointed counsel. The citizenry at large have an interest in prompt and definite finality. While their interest has not been expressed in any "speedy collateral review" statute, the public of Florida have a great interest in prompt determination of the validity of the convictions and sentences of persons who have undergone trial and have been convicted. Comity requires sensitivity, not indifference, to the full spectrum of state interests implicated by federal-state habeas review. There is substantial dissatisfaction in our country with the operation of two-tier collateral review. This is not the place to discuss whether this malaise is justified; the point is that it does not originate from only state courts and state judges and is not limited to assertion of their interests.

Of course, neither public nor governmental desire for prompt finality can diminish the principle that criminal convictions and sentences secured in violation of our national Constitution cannot stand. The federal courts must carry out the responsibility assigned to them in two-tier constitutional review, and when conviction or sentence does violate the Constitution the court must unflinchingly set it aside. The problem addressed in this case is not the scope or the thoroughness of federal review but whether a state through its duly authorized officer can waive one step in two-tier review in an effort to secure a more prompt final decision from the forum that predictably will be the ultimate forum on the constitutional issue.

With respect to the second prong of the rephrased question, relating to the authority of the attorney general to waive, we hold that Florida law empowers the attorney general to represent the interests of the sovereign. See Part II, A supra. We hold alternatively that even if comity is limited to state courts and judges, the Florida attorney general has the power to speak for their interests. A contrary holding cannot be reconciled with the state law we have discussed previously. Id.[13] Moreover, state courts and judges are neither parties nor counsel

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[13] Trantino assumes, without examination of state law, that the New Jersey attorney general had no authority to appear and speak for the state courts and judiciary to the extent that they might have a special interest in a habeas case.

in habeas cases, and if the state's chief legal officer cannot speak for them, no one can. Refusing to permit waiver by the attorney general is tantamount to a blanket prohibition against waiver of exhaustion, and, in federal habeas cases, converts the flexible concept of comity into a hard and fast jurisdictional requirement. If exhaustion were truly jurisdictional, we could not properly dispense with it as we do in cases where state courts have had the opportunity to address the merits of petitioner's constitutional claims but have not done so. Francisco v. Gathright, 419 U.S. 59 (1974); Houston v. Estelle, 569 F.2d 372 (5th Cir. 1978); West v. Louisiana, 478 F.2d 1026, 1034 (5th Cir. 1973) (long and unjustified delay in the particular case), aff'd in pertinent part, 510 F.2d 363 (5th Cir. 1975) (en banc). We could not accept acknowledgments by attorneys general that state remedies are ineffective or state procedures futile without examining and ruling on the substantive correctness of each acknowledgment. See Part II, B(1) supra. We could not entertain a petition where there has been an intervening change in state law since petitioner exhausted. Roberts v. LaVallee, 389 U.S. 40, 19 L.Ed.2d 41 (1967). There could not be an "unusual circumstances" exception to exhaustion, such as Trantino itself recognizes. 563 F.2d at 96. "The policies that the exhaustion

rule serves are important. . . . [but a court] need not make a fetish of exhaustion." 17 Wright, Miller & Cooper, Federal Practice and Procedure Sec. 4264, at 653-54 (1978).

(C) Summary

The prior case law of the former Fifth Circuit, this circuit and the Supreme Court, the nature of comity and exhaustion, and Florida law coalesce in support of our holdings that exhaustion can be waived and that the Florida attorney general may validly make the waiver decision on behalf of the state.

There is no merit to the argument of petitioner that the state cannot waive, or the district court accept waiver, because he has an absolute right conferred by Sec. 2254 or the Constitution that his case be given both levels of review. He has no right to control the operation of the comity-rooted system.

III. Discretion of the district court to accept the waiver

We hold that the district court in its discretion may accept the waiver of exhaustion in a habeas case as to any one or more issues or may reject it.[14] The power of the state to decide

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[14] Westbrook did not decide this issue:

> We do not address the issue of whether a district court is bound by a state's waiver of exhaustion when the district court believes exhaustion would not be futile or evidentiary development would be aided by dismissing the federal petition until the

that exhaustion disserves its interests is not an unqualified right to force the federal forum to litigate all issues without state review.

Comity is not a one way street. "The notion of comity which underlies the exhaustion doctrine must be understood not as a capitulation of federal power to state interest; rather, comity involves a delicate compromise of both state and federal concerns." Carter v. Estelle, 677 F.2d 427, 442 (5th Cir. 1982). Strong federal interests may exist that, balanced against those of the state in the particular case, will permit the district court in its discretion to decline a waiver and require state exhaustion. An unconditional right of waiver would increase the burden on the federal system. In a particular case, fact finding on the issues with respect to which waiver is asserted may be done best in the state court. The complete factual record will aid the federal court in its review. Rose v. Lundy, 71 L.Ed.2d at 388. When state courts initially address requests for collateral relief some cases will never reach the federal courts, for the state courts will recognize constitutional violations and grant relief. Other cases will be abandoned or mooted. More-

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state courts have been given an opportunity to entertain the petitioner's claims.

704 F.2d at 1494 n.9.

over, while Sec. 2254 reflects deference to state fact finding, the exhaustion requirement increases state courts' familiarity with and hospitality to federal constitutional claims. Id.

Federal courts too have an interest in prompt and effective finality. But the court must have discretion to see whether waiver will further that aim and to balance it with other factors. The court may consider whether extensive or minimal fact finding is involved or only questions of law on an already adequate record and, if fact finding is involved, whether it may be done as part of a federal hearing required on other issues. The court may consider how long since petitioner's conviction and sentence were imposed, how long state exhaustion will require, and the comparative status of the dockets of federal and state courts. The court may give weight to whether there are fundamental state policies at stake in the case or threshold issues of undecided state law. In Sweet v. Culp, 640 F.2d 233, 237 (9th Cir. 1981), the attorney general acknowledged in district court that exhaustion was futile and the district court accepted this as a waiver. On appeal the Ninth Circuit held that the attorney general's concession was not binding on the court and that the district court should have required first-tier state court review of the constitutionality of the state criminal statute whose validity was in question. We agree with this approach.

The federal district court, if it declines to accept the waiver, would not, as the state seems to believe, compel Florida courts to adjudicate the unexhausted claims. It would simply ensure that state courts have the opportunity to decide those claims, and the decision would not displace state rules regarding summary dismissals or successive writs.

IV. Conclusion

We turn to the disposition of this case. We hold that the district court had authority to grant the motion for continuance pending exhaustion of Thompson's new claims in state court. We hold that in a habeas case the attorney general of Florida may explicitly waive exhaustion of state remedies on behalf of the state sovereign and the state courts. We hold that the district court, in its discretion, may accept or reject the waiver.

As to the district court's treatment of the waiver, the continuance order itself does not reveal whether the court considered the state's decision to waive exhaustion. A subsequent order staying the case pending appeal, however, indicates that the district court was aware of the state's waiver when the continuance order was entered but, without discussion, did not accept it. See note 2 supra. We are unable to determine whether the district court's rejection of waiver was proper, because we do not know whether it rejected the waiver because it decided

that the state, through its attorney general, could not waive exhaustion or because it thought exhaustion would aid federal review. While we imply no view on whether the court should accept or reject the tendered waiver, it is appropriate that we vacate the decision and order of the district court so that it can again consider, under the principles we have set out, whether to accept or reject the waiver.

VACATED and REMANDED for proceedings consistent with this opinion.

FOR THE ELEVENTH CIRCUIT

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
OCT 19 1983
SPENCER D. MERCER

No. 82-6052

WILLIAM LEE THOMPSON,

Petitioner-Appellee,

versus

LOUIE L. WAINWRIGHT,

Respondent-Appellant.

Appeal from the United States District Court for the
Southern District of Florida at West Palm Beach

O R D E R :

(xxx) The motion of appellant
for [X] stay [ ] recall and stay of the issuance of the mandate
pending petition for writ of certiorari is DENIED.

( ) The motion of appellant
for [ ] stay [ ] recall and stay of the issuance of the mandate
pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____
for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____
for a further stay of the issuance of the mandate is DENIED.

s/s JOHN C. GODBOLD
UNITED STATES CIRCUIT JUDGE

MDT-4
(Rev. 6/82)

A-40

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-365-Civ-JCP

WILLIAM LEE THOMPSON,)
Petitioner,)
v.)
LOUIE L. WAINWRIGHT, etc.,)
Respondent.)

ORDER

This cause came before the Court on the judgment of the United States Court of Appeals for the Eleventh Circuit directing that this Court's order of continuance, dated April 28, 1982, be vacated and this cause remanded for further consideration consistent with the principles set forth in the appellate decision, Thompson v. Wainwright, 714 F.2d 1495 (11th Cir. 1983).

The issue before this Court is whether to accept or reject the state's waiver of the exhaustion requirement of 28 U.S.C. §2254. Id. Acceptance of the waiver will result in denial of the petitioner's motion for a continuance. Rejection will result in granting the continuance so that petitioner can pursue his unexhausted state remedies.

In light of the discretionary nature of the ruling on this issue and the principles discussed by the appellate court, this court is primarily concerned with the parties' position on the following considerations:

1. The nature and extent of the fact finding required for proper resolution

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of the petitioner's unexhausted claims;

2. The amount of delay already incurred in this case and reasonably foreseeable if the continuance is granted. This consideration involves inquiry into how long it has been since petitioner's conviction and sentence were imposed, how long state exhaustion will require, and the comparative status of the dockets of federal and state courts; and,

3. The nature of the legal issue involved; specifically, whether there are fundamental state policies at stake in the case or threshold issues of undecided state law.

Id. at 1509.

Of course, the Court will entertain argument on any other factors the parties believe to be relevant to the resolution of this issue.

Accordingly, it is ORDERED and ADJUDGED that:

1. The Mandate of the United States Court of Appeals for the Eleventh Circuit be, and the same is, hereby made the order of this Court.

2. The petitioner shall serve and file a memorandum of law on the above outlined issue and factors no later than December 8, 1983; respondent's reply memorandum shall be filed no later than December 23, 1983.

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(Rev. 8/82)

DONE and ORDERED at West Palm Beach, Florida this 23 day of November, 1983.

James C. Paine
United States District Judge

cc: Calvin L. Fox, Esq.
Michael L. Von Zamft, Esq.

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(Rev 8/82)

FILED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-365-Civ-JCP

WILLIAM LEE THOMPSON,

Plaintiff,

v.

LOUIE L. WAINWRIGHT, etc.,

Respondent.

ORDER

This cause came before the Court upon review of the petitioner's memorandum of law in opposition to waiver of exhaustion, docket no. 47, and the respondent's response, docket no. 49.

The issue before this Court is whether to accept or reject the state's waiver of the exhaustion requirement of 28 U.S.C. §§2254. On November 23, 1983, this Court requested that the parties brief this issue. Upon review of the materials submitted by the parties and for the reasons set forth below, this Court concludes that the state's waiver should be accepted and the petitioner's motion for continuance should be denied.

The decision of whether or not to accept the state's waiver rests in this Court's sound discretion. Thompson v. Wainwright, 714 F.2d 1495, 1508 (11th Cir. 1983). The appellate court's elaborate discussion of comity and the federal and state interests at stake in this case provides the framework for analyzing the factors affecting the exercise of that discretion. Comity

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(Rev. 8-82)

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involves "a delicate compromise of both state and federal concerns." Id. at 1509, quoting Carter v. Estelle, 677 F.2d 427, 442 (5th Cir. 1982). No single factor discussed is determinative. The notion of comity entails the process of balancing. Four factors figuring into this process are identified and discussed below, in an endeavor to set forth the grounds upon which this Court has exercised its discretion.

I.

First, the state's decision that waiver will best further its interests is one factor to be considered. The State Attorney General has the authority to represent the interests of state courts and judges. Id. at 1500-1501. "Exhaustion is intended to give the state the opportunity for initial review." Id. at 1504. (Emphasis in the original). Thus, the state's considered judgment in deciding to forego this opportunity is entitled to some deference. Moreover, "[t]here are many identifiable and important state interests implicated in the interplay of the two-tier collateral relief systems that reach far beyond the interests of state courts and judges." Id. at 1507. These interests include the Attorney General's interest in the effective administration of the state's criminal laws and in the conservation of scarce resources -- lawyers and staff support -- in the representation of the state in both state and federal proceedings, the Governor's interest in the prompt execution of death warrants and the Florida citizen's interest in prompt and definite finality. Id. "Comity requires sensitivity, not indifference, to the full spectrum of

state interests implicated by federal-state review." Id. The state's waiver of the exhaustion requirement is an assertion that all of these interests are best vindicated by the prompt resolution of petitioner's claims in the federal forum. That assertion is entitled to some weight in the balance of interests underlying the notion of comity.

Second, the nature and extent of the fact-finding required for proper resolution of petitioner's unexhausted claims does not dictate reference to state courts. Petitioner has stated two unexhausted claims: 1) his guilty plea was involuntary and unintelligent as it was solely the product of coercion by the co-defendant Surace and 2) his counsel failed to render effective assistance of counsel. Published decisions reveal that the state court record in this case includes the entry of petitioner's guilty plea, Thompson v. State, 389 So.2d 197 (Fla. 1980), the petitioner's testimony on behalf of the co-defendant Surace, Surace v. State, 378 So.2d 895 (Fla. 3d. DCA 1980) and petitioner's attempt to recant his testimony at Surace's trial, Thompson v. State, 410 So.2d 500 (Fla. 1982). There exists, then, a record of many of the aspects of petitioner's claims. There are other aspects of his claims that will require an evidentiary hearing, but this type of hearing is common in the federal courts. See, e.g. Sullivan v. Wainwright, 695 F.2d 1306 (11th Cir. 1983)(Magistrate conducted three day hearing on petitioner's claim of ineffective assistance of counsel). Owens v. Wainwright, 698 F.2d 1111 (11th Cir. 1983)(Magistrate conducted hearing on petitioner's claims of involuntary and unintelligent plea and

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ineffective assistance of counsel). The state estimates that two days will be required for the hearing on petitioner's unexhausted claims. Petitioner intends to offer his own testimony and that of his prior counsel, his co-defendant and his co-defendant's counsel. He also intends to introduce evidence of psychiatric examinations1/ and the background of the victim. This Court concludes that minimal fact-finding will be required to supplement this nearly-complete record and that such fact-finding may be done as part of a federal hearing required on the other issues petitioner has raised.

Third, this Court is not persuaded that petitioner's claims involve fundamental state policies or threshold issues of undecided state law.2/ For example, these claims do not raise the issue of the constitutional validity of a state statute, as in Sweet v. Culp, 640 F.2d 233, 237 (9th Cir. 1981).

When faced with a claim that a guilty plea was entered involuntarily, Florida courts have consistently referred to federal law, specifically, Boykin v. Alabama, 395 U.S. 238 (1969) and its progeny. See, e.g., Alder v. State, 382 So.2d 1298, 1300

1/ During the state court proceedings, petitioner was examined by four psychiatrists. Thompson v. State, supra, 389 So.2d at 199. Presumably, there is a record of their findings and conclusions which could be reviewed by this court.

2/ The state's argument on this consideration is considerably misdirected. Rather than arguing what state policies or important legal questions would confront the state courts upon review of petitioner's claims, the state argued that important state policies were implicated in its pending writ before the Supreme Court.

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(rv.8/82)

(Fla. 3d DCA 1980). Holmes v. State, 374 So.2d 944, 947 (Fla. 1979). Furthermore, the issue itself is largely factual in nature. Owens v. Wainwright, supra, 698 F.2d at 1112-1113. It is highly unlikely that reference of this claim to the state courts would result in any significant evolution of state law.

So too, the Florida courts would look to federal law on the claim of ineffective assistance of counsel. See e.g., Adams v. State, 380 So.2d 423 (Fla. 1980)(reference to federal law in resolving claim of ineffectiveness of counsel). The standards of competence demanded by the federal constitution and the burden of proof required to establish ineffectiveness have been set forth clearly in this circuit. Washington v. Strickland, 693 F.2d 1243 (5th Cir. Unit B. 1982)(en banc), cert. granted, ____ U.S. ____, 103 S.Ct. 2451 (1983).3/ Owens v. Wainwright, supra, 698 F.2d at 1113-1114. King v. Strickland, 714 F.2d 1481, 1458-1486 (11th Cir. 1983).

There is no reason to believe that the state and federal courts would reach different conclusions on petitioner's claims when both would follow the same lines of federal decision. And Florida's familiarity with and hospitality to these federal constitutional claims would not be significantly increased by the requirement of exhaustion in this case.

3/ That the state is seeking reversal of Washington before the Supreme Court makes no difference in the balance of interests underlying comity. A Supreme Court decision reversing Washington would require reconsideration by the court system first resolving petitioner's claim, be it state or federal.

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(Rev 8/82)

Fourth, the amount of delay incurred in the state and federal proceedings in this case has been lengthy. The offense was committed in March of 1976. Petitioner was sentenced in September of 1978 and the Governor signed the death warrant in February of 1982. The case was before this Court from February of 1982 until the appellate court asserted jurisdiction in October of 1982. The matter was on appeal from October of 1982 until the until the Mandate was received in this Court on November 9, 1983. Another appeal to the Eleventh Circuit is likely. Exhaustion will create even more delay, thereby thwarting the interests of promptness shared by the state and federal systems. Compared to the other factors above, this factor alone should be given less weight. Reasoned judicial determination should not be compromised solely in the interests of speed. Coupled with the other factors, however, consideration of this factor leads to the conclusion that the additional time incurred by continuing this matter for exhaustion would not be well spent.

II.

In view of the conclusion reached by this Court, the appropriate procedure to follow is to set this matter for an evidentiary hearing to consider all of petitioner's claims. In an effort to narrow the issues for the hearing, this Court will issue its pre-trial order and require counsel to follow the procedures set forth therein. Additionally, counsel should provide the Court with relevant portions of the state court record.

Accordingly, it is

ORDERED and ADJUDGED that

1. The state's waiver of the exhaustion requirement of 28 U.S.C. §2254 is accepted.

2. The petitioner's motion for continuance is denied.

DONE and ORDERED at West Palm Beach, Florida this 10th day of February, 1984.

James C. Paine
United States District Judge

cc: Calvin Fox, Esq.
Michael Van Zampft, Esq.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CASE NO. 83-1421

RECEIVED
APR 9 - 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

LOUIE L. WAINWRIGHT,

Petitioner,

vs.

WILLIAM LEE THOMSPON

Respondent.

CERTIFICATE OF SERVICE

I, MICHAEL L. VON ZAMFT, hereby certify that I am a member of the bar of the Supreme Court of the United States and that I have served copies of the Motion to Proceed In Forma Pauperis, Brief of Respondent on Jurisdiction and Affidavit of Mailing on counsel for the Petitioner by depositing same in the United States mail, first class, postage prepaid, addressed as follows:

CALVIN F. FOX, ESQ.
Asst. Attorney General
401 N.W. 2nd Avenue
Suite 820
Miami, Florida 33128

DONE this 6th day of April, 1984.

Respectfully submitted,

KRAVITZ & VON ZAMFT
7600 West 20th Avenue
Suite 223
Hialeah, Florida 33016
Telephone: 558-5300

By: Michael Von Zamft
MICHAEL L. VON ZAMFT
Attorney for Respondent
WILLIAM LEE THOMPSON

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

RECEIVED
APR 9 - 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 83-1421

LOUIE L. WAINWRIGHT,
Secretary, Florida Department
Of Corrections, Petitioner

v.

WILLIAM LEE THOMPSON,
Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Respondent, WILLIAM LEE THOMPSON, who is presently being held in Florida State Prison (Death Row), asks leave to file the attached Brief of Respondent on Jurisdiction without prepayment of costs and to proceed in this cause in forma pauperis, pursuant to Rule 46.

The Respondent was granted leave to proceed in forma pauperis in the United States District Court for the Southern District of Florida on April 28, 1982. Respondent was additionally appointed counsel on January 19, 1983 in the United States District Court for the Southern District of Florida. The orders granting leave to proceed in forma pauperis and appointing counsel are attached to this Motion.

Respectfully submitted,

MICHAEL L. VON ZAMFT
Counsel for Respondent

By: Michael Von Zamft
KRAVITZ & VON ZAMFT
7600 West 20th Avenue
Suite 223
Hialeah, Florida 33016
Telephone: (305) 558-5300

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

WILLIAM LEE THOMPSON,	:	82- 365 CIV-JCP
Petitioner,	:	CIVIL ACTION NO. ____
vs.	:	
LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections	:	
Respondent.	:	

FILED by D.C.
APR 28 1982
JOSEPH P. BRIGANTI
CLERK, U. S. DIST. CT.
S. D. OF FLA. W.P.B.

ORDER PERMITTING PETITIONER
TO PROCEED IN FORMA PAUPERIS

Petitioner, an inmate at Florida State Prison at Starke, Florida, seeks to file in forma pauperis a habeas corpus petition pursuant to 28 U.S.C. §2241-54. It appearing that Petitioner is an indigent and is without funds to prosecute this action.

IT IS ORDERED THAT Petitioner's Application for Leave to Proceed In Forma Pauperis is hereby granted and

IT IS FURTHER ORDERED THAT the Clerk of this Court is directed to permit this action to be filed in forma pauperis and to permit Petitioner to proceed without prepayment of costs or fees.

Norman C. Roettger

Honorable
United States District Judge
Southern District of Florida
Miami Division

Dated this 28th day of April, 1982.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-365-CIV-JCP

WILLIAM LEE THOMPSON

v.

LOUIE L. WAINWRIGHT

ORDER

RECEIVED & FILED IN OPEN COURT
ON 1-19-83 AT
WPB FLA.
Joseph L. Gagnet, Clerk
United States District Court
Southern District of Florida

This cause is before the court on petioner's

motion [ ] To dismiss

[ ] For extension of time

[ ] To strike

[ ] To quash

[ ] For protective order

[ ] For leave to amend

[ ] For new trial

[ ] For more definite statement

[XXX] For Appointment of Counsel(DE 38)

Having considered the record in the cause, it is ORDERED and ADJUDGED that said motion is Granted.

DONE and ORDERED at West Palm Beach, Florida, this 19th day of January, 1983.

James C. Paine
United States District Judge

cc: Calvin Fox, Esq
Michael L. vonZamft, Esq